

Los Angeles County Bar Association

Ethics Opinions 351-449

Sources of Opinions

- Opinions 391, 393, 397, 401-403, 405-408, 411-416, 418-422, 425-427, 429-431, 433, 426-429, 441-444, and 446-449 were obtained by email from the Los Angeles County Bar Association.
- Opinions 417, 424, and 445 were obtained from the Los Angeles County Bar Association's website at <https://www.lacba.org/resources/tools-documents/ethics-opinions>.
- All other opinions were scanned from the print collection of Loyola Law School, Los Angeles.

Finding Earlier and Later Opinions

- The Los Angeles County Bar Association's website provides all opinions from 450 forwards and selected opinions from 1 to 350.
- All opinions from 1 to 350 were published in the print book *Ethics opinions. Opinions of the Committee on Legal ethics of the Los Angeles County Bar Association with Rules of Professional Conduct and Canons of Professional Ethics Annotated*. For a list of libraries holding the print book, see http://www.worldcat.org/title/ethics-opinions-opinions-of-the-committee-on-legal-ethics-of-the-los-angeles-county-bar-association-with-rules-of-professional-conduct-and-canons-of-professional-ethics-annotated/oclc/226476674&referer=brief_results.

Limitations

- This file is missing opinions 387, 428, 434, 435, and 440, as well as the second page of opinion 393. If you can provide scans of the missing content or if you notice any other missing content or errors, please email caitlin.hunter@lls.edu.
- This file has been run through basic Optical Character Recognition (OCR) but should not be considered reliably full text searchable. To locate ethics opinions by topic, consult the California Compendium on Professional Responsibility Index at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Publications/Compendium-on-Professional-Responsibility-Index>. Opinions within this file are individually bookmarked, allowing you to retrieve the relevant opinions by number after you have identified them using the index.

OPINION NO. 351
ADOPTED BY THE COMMITTEE ON LEGAL ETHICS
OF THE LOS ANGELES COUNTY BAR ASSOCIATION
(SEPTEMBER 11, 1975)

ADVERTISING-BUSINESS ACTIVITIES-ENGAGING
IN ANOTHER OCCUPATION-SOLICITATION. A
member of the State Bar of California who
is also a Certified Public Accountant may
practice both professions, provided each
is conducted at a separate location and
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ards governing members of the State Bar of
California. (L.A. Opinion 285 disapproved.)

Rules interpreted: Rules of Professional
Conduct,
Rules 2-101, 2-103,
2-104, 2-106.

Code of Professional Responsibility,
DR 2-102(A), (E), 2-103, 2-105.

A member of the State Bar of California who is also a
Certified Public Accountant inquires about the propriety
of dual practice under these circumstances: He is associat-
ed with a law firm, not a partner; his name is not in the
firm name but appears on the firm's letterhead. He is also
one of two partners in a firm of CPA's, and presumably
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pletely independent, but both offices are in the same build-
ing, law firm on the first floor, accounting office on the
second floor. On the building directory, the name of the
dual practitioner appears under each firm name. The dual
practitioner intends to work three days a week for the CPA
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there is no feeding of clients between firms, no clients
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dual practitioner have been advised that the only services
rendered to them will be those of the one profession the

client originally sought out.

The most common objection to the dual practice of law and accountancy is that the CPA practice will feed the law practice, an indirect form of soliciting and advertising, Rule 2-101 (former Rule 2a). On those grounds, this Committee has said it is impermissible for "Attorney at Law" to be immediately followed by "Certified Public Accountant" on a lawyer's professional card or letterhead (L.A. Opinion No. 224), or on the lawyer's listing in an office building directory, or in other announcements or "means of publication". (L.A. Opinion No. 225; see Rule 2-103). The same objection was held to prohibit this dual practice "by one person at the same place of business" (L.A. Opinion No. 224). Further, the double designation was said to be the unauthorized advertisement of a specialty (L.A. Opinion No. 225, citing former Canons of Professional Ethics 27 and 46; see DR 2-105, Dr 2-102(A)(6), and Rule 2-106).

This Opinion does not undertake a review of the long history of sometimes varying opinions relating to practicing lawyers simultaneously engaging in a second occupation. The underlying theme, however, is the danger of violating the rules on advertising and solicitation, a danger which increases as the additional enterprise "entails activities which, if carried on by a lawyer, would involve the practice of law" (See L.A. Opinion No. 285, Cal. State Bar Opinion No. 1968-13 and Drinker, Legal Ethics pp. 221-222). But insofar as our Opinions Nos 285 and No. 224 were considered as prohibiting a lawyer from engaging in another business, they were disapproved by this Committee in L.A. Opinion No. 331.

Before the adoption of the Code of Professional Responsibility, the American Bar Association Committee on Professional Ethics, as an interpretation of Old Canon 27 (dealing with solicitation and advertising), had stated explicitly: "The person who is qualified as both a lawyer and an accountant must choose between holding himself out as a lawyer and holding himself out as an accountant." (ABA Opinion 297).

DR 2-102(E) of the A.B.A. Code of Professional Responsibility reads: "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business." Based in part on the inference from that language recognizing the right of some dual practice, and the fact that the Code of Professional Responsibility nowhere speaks in terms of "solicitation", ABA Opinion 328 now says that it is proper for a lawyer to "simultaneously hold himself out as a lawyer and an accountant provided the requirements of DR 2-102(E) are met," i.e. the holding out may not be on the same letterhead, etc. Further, the opinion says that the lawyer may carry on the occupations of CPA and lawyer from the same office, though the path is perilous. The opinion warns that since accountancy is a law-related profession, and the lawyer's work as CPA will involve some practice of law, the lawyer will be held to lawyer standards in the second occupation. That means compliance not merely with DR 2-102(E), but with the whole of the Code of Professional Responsibility. Rules on fees (DR 2-106), publicity (DR 2-101, 2-103, 2-104),

confidences (DR 4-101), and fiduciary duties (DR 5-101, 5-104, 5-105) are instanced.

Rule 2-103(E), California Rules of Professional Conduct and DR 2-102(E) are substantially the same and as pointed out, opinions of this Committee and the A.B.A. Committee reach substantially the same conclusions, that dual practice as such is not forbidden (L.A. Opinion No. 331), but that juxtaposing "Attorney at Law" and "Certified Public Accountant" is forbidden (L.A. Opinion Nos. 224 and 225). Contrary to ABA Opinion 328, our Opinion No. 224 disapproves one-office dual practice, (which, in any event, is not distinctly raised by the present inquiry). Also, as pointed out in State Bar Opinion No. 1968-13, mentioned above, under decisions of the California Supreme Court a member of the State Bar must conform to State Bar standards "'in whatever capacity he may be acting in a particular matter'" (See also, ABA Opinion 336). Unlike the ABA Code of Professional Responsibility, the California Rules continue explicitly to bar solicitation (Rule 2-101). Nonetheless, it is believed that the substance of the prohibition is in both codes. See, for example, the difficulties of the dual practitioner in complying with DR 2-103(A) and our substantially identical Rule 2-104, that the lawyer shall not recommend ... himself ... to a non-lawyer who has not sought his advice regarding employment" of a lawyer.

Taking cognizance of the proliferation nationwide of dual practice by lawyer-CPA's, the Committee reaffirms the ban on juxtaposing "Attorney at Law" and "Certified Public Accountant" (L.A. Opinion Nos. 224 and 225), and the ban on one office dual practice (L.A. Opinion No. 224), re-

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This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the questions submitted.

**Los Angeles County
Bar Association**

Suite 1212
606 South Olive Street
Los Angeles, California 90014
213 624 8571



LOYOLA UNIVERSITY

October 13, 1975

MAY 13 1976

Re: Ethics Opinion

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Thank you.

Walt D. Osborne
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FORMAL OPINION NO. 352
(JANUARY 15, 1976)

AVOIDING THE REPRESENTATION OF ADVERSE INTERESTS--CLIENT'S CONSENT. It is improper for a lawyer having a contingent fee in a personal injury case to accept additional compensation for services rendered from a medical insurance carrier which has an interest in the client's recovery, unless the client is fully informed of the arrangement between the lawyer and the insurance company and gives knowledgeable consent in writing. (Informal Opinions 1965-13 and 1972-23 disapproved to the extent that they are inconsistent herewith).

California Rules: 5-102

ABA Code: EC 2-21
DR 5-107(A)

The Committee's opinion has been requested in connection with the following:

The inquiring attorney has been retained to represent the plaintiff in a personal injury action. The attorney has a contingent fee contract with the plaintiff which provides for payment to the attorney of one-third of any recovery by the plaintiff.

The plaintiff's medical insurance coverage calls for reimbursement of medical expenses to the insurance carrier after a settlement or judgment has been attained. The insurance carrier proposes by separate written agreement to pay plaintiff's attorney one-third of any medical expenses recovered. The purpose of this second agreement is to employ the attorney to protect the lien of the insurance company on the recovery to insure its payment.

The result of the two agreements would be that the attorney, if successful, would receive from his client one-third of the gross recovery and in addition would receive from the foundation

one-third of medical expenses recovered. The total fee to the attorney would therefore be in excess of one-third of the gross recovery.

The attorney asks if he may ethically make such a contract for and collect this additional compensation from the insurance carrier.

The Committee assumes for purposes of the inquiry that the attorney has stated the correct interpretation of the contracts.

EC 2-21 provides that a lawyer should not accept compensation or anything of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure. DR 5-107(A) contains the same prohibition.

In Informal Opinion No. 1965-13, this Committee concluded on facts similar to those set forth in this inquiry that it was proper for plaintiff's attorney to charge a fee to the hospital having a right to reimbursement for medical benefits supplied the plaintiff, if the attorney made the necessary disclosure to and received the consent of the plaintiff after he had been fully informed. The Committee in formulating Informal Opinion No. 1965-13 stated that it had not considered the apparent representation of adverse and conflicting interests.

Two principles are involved in the prohibition of taking compensation from another. The first is that a lawyer shall receive no secret remuneration from the other side. This can be resolved by disclosure to the client. The second principle is that the attorney must not, by accepting or bargaining for any compensation from another, even if fully disclosed to his client, put himself in a position which will interfere with his

wholehearted duty to his client. For example, in Informal Opinion 1972-23 this Committee concluded that an attorney representing the buyer in a real property transaction could not accept a portion of the broker's commission on said sale unless after full disclosure he obtained the full and knowledgeable consent of his client and the attorney agreed that any amounts received from the broker would be used to reduce the amount owing the attorney by the client, and if the amount received from the broker exceeded the fees owed by the client, the difference would be paid to the client. The Committee further stated in that opinion that "full and knowledgeable consent of the client" requires the attorney to inform the client of the proposed arrangement, to inform the client of the possibility that as a result of the proposed arrangement the attorney might have an interest which conflicts with that of the client, and to make sure that the client understands the full import and implication of this potential conflict and its effect on him.

The Committee believes that the agreement with the insurance company creates an attorney-client relationship and that the attorney is thereby representing adverse and conflicting interests. Rule 5-102 would permit such representation if written consent were obtained. The Committee believes, however, that the difficulties of explaining to the client all the possible conflicts and adverse interests involved may, as a practical matter, preclude obtaining the knowledgeable consent of the client except in extraordinary circumstances the exact nature of which the Committee does not attempt to delineate. It is the opinion of the Committee that only if such knowledgeable consent has been received is it proper for a lawyer to enter into an agreement or

accept compensation pursuant to an arrangement with an insurance company such as that described in this inquiry.

To the extent that Informal Opinions 1965-13 and 1972-23 are inconsistent with this conclusion, they are hereby disapproved.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in this inquiry..

OPINION NO. 353
(February 12, 1976)



ATTORNEY AND CLIENT - CONFIDENTIAL COMMUNICATIONS -
CONFLICTING INTERESTS - DISCLOSURE. It is improper for an attorney to continue to represent a client where the transaction involves the illegal issuance of securities, and a merger between the client and an affiliated corporation of which the attorney is an officer, director, and house counsel for its parent; the attorney should attempt to persuade the officers of his client that the proposed action is ill-advised, explaining the consequences, and should if necessary report the matter to the board of directors; he should avoid disclosure outside the client corporation, however, unless he is satisfied that a serious crime, in the sense of one likely to seriously damage members of the public, is imminent.

Rules interpreted: Rules of Professional Conduct,
2-111 (A)(2)
2-111 (C)
6-101
5-102 (B)

ABA Code of Professional Responsibility,
DR 4-101 (C)(3)
DR 4-101 (C)(4)
DR 5-101 (A)
DR 7-102 (A)(7)
DR 7-102 (B)
EC 5-15
EC 5-18
EC 7-5

Statutes: Business & Professional Code Section,
6068 (a)

Evidence Code Sections,
958
962

An attorney has inquired about the propriety of his continuing to document a transaction involving the merger of a real estate company ("Company") and a 20% owned affiliate ("Affiliate") which is also a real estate company. The management of Affiliate insists that the securities proposed to be issued in the merger will not be "registered", presumably under the Securities Act

of 1933, despite the advice of the attorney that registration is necessary.

The attorney is secretary and director of Company, and is also house counsel and assistant secretary of its parent ("Parent"), a publicly owned finance and real estate company. The attorney has been asked by the management of Affiliate "to investigate the legal ramifications and applicable securities laws pertinent to the merger" of Affiliate and Company. In view of the positions taken by the attorney and by the management of Affiliate described above, the attorney requests advice as to his responsibilities and duties in his legal capacity, and in particular whether he must discontinue providing legal services in connection with this transaction or whether he may continue to provide such services so long as he discloses fully to such management the unlawful nature of the transaction.

The following observations and conclusions of the Committee are made with respect to, and are limited to the facts of this inquiry only.

1. The Lawyer Should Make All Practical Efforts to Persuade his Clients to Avoid the Violation. These Efforts Should Include, if Necessary, Notification of the Proposed Violation and its Consequences to the Board of Directors of Client Corporations.

The general duty of a lawyer to act competently and diligently set forth in California Rule 6-101 requires that all possible efforts be made to deter the client from an illegal and ill-advised course of action. (It is assumed that the lawyer is clearly satisfied that registration under the Securities Act of 1933 is required,

and that there is no other reasonable interpretation of the law. See ABA Code EC 7-5). Initially, the lawyer should attempt to persuade the executives of his client corporations that the proposed course of action is illegal, constitutes a crime (as appears to be the case), and is ill-advised in that damaging consequences would seem to be highly likely. The damaging consequences would presumably be specified as including, at the least: (i) possible future involvement of one or more of the companies and their management in damaging administrative, litigation and even criminal proceedings; (ii) the existence of probable rights of rescission and damages against Affiliate and Company in persons acquiring the unregistered securities which would render it likely that future financial statements and reports of the issuing corporation will be defective unless the existence of these rescission rights are disclosed, with additional resulting liabilities and violations; (iii) the possibility that failure to make the disclosures required by registration would be deemed fraudulent under securities acts with additional resulting liabilities; (iv) the probable existence of rights by Affiliate and Company against their respective management personnel (which rights might be derivatively assertable by Affiliate's, Company's or Parent's stockholders) in respect of damages to those companies resulting from the knowing and willful violations of securities laws; (v) the duty of the attorney, as indicated below, to report the proposed violation to the boards of directors of the corporations involved, and to specify the consequences of violation; (vi) the inability of the attorney, as indicated below, to continue to participate in the transaction in

any capacity; and (vii) the possible duty of the attorney, if he concludes that the intended violation constitutes a serious crime and imminence of which he has no doubt, to take other action necessary to prevent the crime. See item 3 herein-after.

ABA Code EC 5-18 states that "a lawyer employed or retained by a corporation owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity." ABA Opinion 202 states that: "Since, however, the board of directors of the . . . company is its governing body, we think (the lawyer), with propriety, may and should make disclosures to the board of directors in order that they may take such action as they deem necessary to protect the . . . company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person." The Committee believes, if the attempts of the lawyer to persuade the the executive officers of the client corporations to desist from the intended violation are unsuccessful, that he should formally report it, together with the probable consequences outlined above, to the boards of directors of the corporations.

2. The Lawyer Should Avoid Continued Legal Services and Other Participation in Connection with the Proposed Illegal Transaction.

The Committee believes that the attorney's continuing to document the illegal transaction on behalf of Affiliate or Company, or continuing legal representation in any way on behalf of either Affiliate or Company, would involve violation of the general ethical prohibition of assistance to a client in conduct known to be illegal contained in ABA Code DR 7-102(A)(7), and,

implicitly in Rule 2-111(C). See also the Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Law Practice -- A Report by the Committee on Counsel Responsibility and Liability, 30 Business Lawyers 1289 (July 1975); ABA Opinion 335.

While the Committee generally limits its advice to ethical questions, we are constrained to add that the attorney should be aware that his continuing to document an illegal securities issuance transaction, knowing of the illegality, might constitute violation of Federal securities laws, including Section 4(2) of the Securities Act of 1932 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. See e.g., SEC v. Spectrum, Ltd., CCH ¶ Fed. Sec. Reg. Rep. Para 94,300 (2d Cir. 1973) reversing CCH Para 93,600 (S.D.N.Y. 1972); cf. Complaint in SEC v. National Student Marketing Corp., 30 F.Supp. 284 (D.D.C. 1972).

Withdrawal where a client seeks to pursue an illegal course of conduct is explicitly permitted under Rule 2-111(C). In this connection, Rule 2-111(A)(2) requires a member of the State Bar of California to take, prior to withdrawal of representation, reasonable steps to avoid foreseeable prejudice to the rights of his client, including specified steps relating to notice to client, allowance of time for employment of other counsel and delivery of papers and other property to client.

While it is beyond the scope of this opinion to comment on the duties of the attorney as a director of Company, the attorney would presumably be under a duty in this capacity to take all appropriate steps to prevent and, at the least, to avoid parti-

cipating in the illegal violation.

3. The Lawyer Should Avoid Disclosure of the Intended Violation Outside the Client Corporations Unless He is Convinced that the Intended Violation Would Constitute a Very Serious Crime and is Satisfied that the Commission of the Crime is Imminent. (1)

California Business and Professions Code Section 6068(e) states that:

"It is the duty of an attorney: (e) to maintain inviolate the confidence, and at every peril to himself preserve the secrets, of his client".

The confidentiality of the lawyer-client relationship is a very strong principle in California. Exceptions to it have been strictly construed. The lawyer should, before failing to preserve the confidences and secrets of his client, be quite satisfied that he falls within an exception to the principle. He truly acts "at every peril to himself" in failing to preserve these confidences and secrets.

The only exception which would appear to be possibly applicable is the exception for the divulgence of future crimes. See People v. Singh, 123 Cal. App. 365 (1932); Abbott v. Superior Court, 78 C.A.2d 19 (1947). See also ABA Code DR 4-101(C)(3). In People v. Singh it was held that even a future intended crime should not be divulged if such disclosure necessarily included the disclosure of past crimes. In addition, information even as to an intended future crime should not be divulged unless the intended acts of the client are of a nature so serious that the benefits of their prevention outweigh the policies underlying the confidentiality principle. L.A. Opinion No. 264. Finally, the exception is inapplicable if the attorney has any doubt "of the existence of an imminent danger

that a crime will be committed." L.A. Opinion No. 274.

ABA Code DR 4-101(C)(3), which states that "A lawyer may reveal: (3) The intention of his client to commit a crime and the information necessary to prevent the crime" is clearly subject, in the case of a California lawyer, to the restrictions of California Business and Professions Code Section 6068(e) and to the limitations on the exceptions thereto described above. ABA Code DR 7-102(B) which requires affirmative disclosure by the attorney of certain frauds, is now expressly subject to the applicable confidential communication privilege.

The lawyer should note one additional exception of the confidentiality relationship. Section 958 of the California Evidence Code states that "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship". (The privilege therein referred to is the lawyer-client testimonial privilege, which is narrower than the confidentiality privilege of Business and Professions Code Section 6068(e).) In this connection see ABA Code DR 4-101 (C)(4), which permits an attorney to reveal confidences necessary ". . . to defend himself . . . against an accusation of wrongful conduct". See also Myerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974).

Where there appears to be the likelihood of a very serious crime, in the sense that significant injury to members of the public is highly likely, especially though not exclusively where the crime will involve physical violence, See L.A. Opinion 264, and where the attorney is satisfied beyond substantial doubt that the crime will occur and is imminent, there may very well

be duties, not necessarily growing out of specific ethical rules or necessarily limited to or involving a person in his capacity as a lawyer, to take affirmative preventive steps involving disclosure to the intended victim or other third persons. Thus, in Tarasoff v. Regents of the University of California, 13 C.3d 177 (1974), (reh. granted March 12, 1975), a psychotherapist, notified by a patient that such patient intended to commit a homicide, was held to be under a legal duty to take appropriate steps to warn the threatened person of the danger and was liable for damages resulting from such failure. Willful failure to register securities would, in some cases, clearly constitute a serious crime in the sense of involving high probability of damage to the public; a lawyer should speak out to prevent a massive fraud on the investing public. On the other hand, serious damage to the public might not be involved in every failure to register, as perhaps in at least some cases of smaller corporations engaging in transactions not involving sales of securities to the general public for cash and not involving apparent deception in the sense of affirmative misstatements or encouragement of misleading impressions.

In addition, a lawyer who had forcefully made the arguments outlined above to the boards of directors of the client corporations, and who had had no evidence during the relationship of fraudulent tendencies on the part of his clients, might have some difficulty in concluding without significant doubt, save in exceptional circumstances, that his arguments might not in the end prevail.

The "at his peril" requirement of Section 6068(e) indicates that the lawyer should divulge an intended crime only

under exceptional circumstances of serious and imminent damage to the public.

4. The Lawyer should Avoid the Representation of Adverse Interests Where There are Serious Questions as to the Possibility and Sufficiency of Informed Consent by All Parties in Interest.

While the inquiry does not make it completely clear that the attorney is rendering legal services to both Company and Affiliate in connection with this transaction, his position as house counsel to Company's parent and as a director and secretary of Company suggests that he is representing Company as well as Affiliate. Such dual representation, without the written consent of both clients, would appear to be ethically improper under Rule 5-102(B). See also ABA Code DR 5-101(A); EC 5-15; Kohn v. Metals Climax, 322 F.Supp. 1331, 1362 (E.D. Pa. 1971), rev'd 458 F.2d 255 at 268 (3d Cir. 1972). Even if he is not representing Company, his representation of Affiliate would appear to involve the ethically proscribed representation of a conflicting interest because of his relationship with Company and because the transaction involves adversely, in a basic way, the interest of Company and Affiliate.

With respect to the written consent exception, Editor's Note to L.A. Opinion No. 108 indicates that "express consent of all concerned" language in a New York County Opinion "has not been construed as sanctioning such representation in all cases of mutual consent but as specifying a possible exception to the general prohibition in the canon against an attorney representing conflicting interests". In addition, Editor's Note to L.A. Opinion No. 22

states that: "In some situations the lawyer should not accept representation of conflicting interests even where consent can be obtained; . . ." One problem is the difficulty of obtaining fully informed consent in situations where both parties represented by the same lawyer are engaged in a transaction on which they are on the opposite side, so that the negotiated benefit of one will often be at the expense of the other. The effect of the loss of the confidential communication privilege between the jointly represented parties, pursuant to California Evidence Code Section 962, is only one of many problem areas involved. The attorney might also wish to consider the possibility that consent of "all" parties concerned might well require the informed consent of the stockholders of Affiliate as well as its management, especially if there are links between management of Company and management of Affiliate.

This Opinion is advisory only. The Committee acts on specific questions submitted ex parte, and as stated initially this opinion is based on such facts only as are set forth in the questions submitted.

(1) A minority of the members of the Committee were of the view that the policy underlying the preservation of a client's confidence would outweigh the competing policy of disclosure in this case and that therefore under the facts of this inquiry disclosure of any intended crime even though imminent would be improper.



ADVERTISING AND SOLICITATION--NEWS-PAPER LEGAL COLUMNS. An attorney may write a legal column in a local newspaper for the purpose of acquainting readers with basic principles and rules of California law, and may be identified by name and as a member of the State Bar, provided that the articles are not written for the primary purpose of attracting lay clients, are not self-laudatory, do not render opinions as to readers' specific legal problems, do not solicit such problems, and do not contain any biographical information concerning the attorney. (L.A. County Opinions Nos. 175, 181 and 200 overruled to the extent they are inconsistent herewith.)

Rules interpreted: Rule 2-102,
ABA DR 2-101

The inquiring attorney, who is now a member of the California Bar, is well versed in the law and religion of the foreign country from which he emigrated. The attorney practiced law in his native country for many years and is well known among his countrymen who now reside in Los Angeles. The attorney has been requested by the editor of a local foreign language monthly newspaper to write a legal column for the newspaper. The purpose of the proposed column is to acquaint the readers, almost all of whom have come from the country from which the attorney emigrated, with basic principles and rules of California law, especially as that law differs from the law of the readers' native country. The column will be written by the attorney on a volunteer basis and he will receive no remuneration therefor. The attorney states that he expects no gain from writing the articles, except the satisfaction of fulfilling a duty

to contribute to the welfare of his fellow countrymen to whom the newspaper is distributed. The essential nature of the attorney's inquiry is whether or not there is any ethical prohibition against his writing such articles in the form described for each edition of the monthly newspaper.

Rule 2-102(A) prohibits a member of the State Bar from preparing, causing to be prepared, using or participating in the use of any form of public communication which contains professional self-laudatory statements calculated to attract lay clients. Section (B) thereof prohibits a lawyer from publicizing himself as a member of the State Bar through newspaper or magazine advertisements, inter alia. Rule 2-102(B) specifically provides as follows:

"...This rule does not prohibit the following limited and dignified identification of a member of the State Bar as a member as well as by name so long as such identification is not primarily directed to attracting lay clients:

.....

(2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

Nothing herein shall be deemed to prevent the publication in a customary and appropriate manner of articles, books, treatises or other public communications or dignified advertisements there-

of so long as neither such public communications nor the advertisements thereof are primarily directed to attracting lay clients."

ABA DR 2-101 contains essentially the same provisions as Rule 2-102.

A number of prior opinions of this Committee and of the American Bar Association support the conclusion that, with the limitations set forth below, it is permissible for an attorney to write articles which are published in newspapers and magazines. Thus, Opinion No. 87 of this Committee states in substance that it is not professionally improper for an attorney to write a series of short articles on tax problems for publication in a community newspaper, provided the articles are not self-laudatory. In a somewhat analogous situation, this Committee (in Opinion No. 148) suggested that published articles should contain a "cautionary statement" in which the reader was advised to consult counsel of his own selection regarding his individual problems. The Committee concluded, however, that an attorney may with propriety accept employment to prepare or check and revise articles of a general nature upon legal subjects for publication in newspapers, tax newsletters and other periodicals.

In opinion No. 175, this Committee held that a lawyer may, with propriety, write articles for publication in which he gives information upon the law but that he should not use a newspaper to advise inquirers as to their individual rights or to render opinions to them, even anonymously. In Opinion No. 200 this Committee held that an attorney may per-

mit his name to appear as author of an article upon a legal subject in a lay periodical.

In Informal Opinion No. 1964-2, the Committee held that it was proper for an attorney to prepare an opinion on the application of California law to certain activities of private investigators for an association of private investigators. In addition to the prohibitions set forth above, the Committee, in this opinion, also stated that the article may not contain any biographical information relating to the attorney. See also L.A. Informal Opinions Nos. 1960-4 and 1971-5.

Based on the opinions cited above and the present rule, it is the Committee's opinion that it is permissible for the inquiring attorney to write the legal column for the newspaper in question and be identified by name and as a member of the State Bar, provided that none of the following prohibitions is violated:

1. The article is not primarily directed to soliciting or attracting lay clients. In this connection, it should be noted that the inquiring attorney specifically disclaims any such intention.

2. No self-laudatory comments or statements are contained in any article which is published.

3. The attorney does not, in any article, answer individual questions that are submitted to him by readers and the attorney does not invite the submission of such questions. (L.A. Opinion No. 181; ABA No. 162). In this connection, it should be noted that an attorney may not answer individual inquiries for legal advice through a

newspaper column even though the attorney remains anonymous; only questions of general public interest will be answered; readers will be cautioned not to rely on the article as answers to the specific questions but to consult their attorneys; and the column will be written in a lecture tone rather than as an adviser of legal rights. (ABA No. 270).

4. The article contains no biographical information relating to the attorney other than a statement of his name and that he is an attorney. In this connection, it should be noted that in L.A. Opinion No. 200 referred to above, this Committee held that although an attorney may permit his name to appear as author of an article on a legal subject in a lay periodical, he should not permit reference to his profession. L.A. Opinion No. 200, as well as L.A. Opinions Nos. 175 and 181, were written before the adoption of the new Rules of Professional Conduct (on January 1, 1975). Rule 2-102(B) now permits an attorney to identify himself by name and indicate that he is a member of the State Bar, so long as such identification is not primarily directed to attract lay clients. Rule 2-102(B)(2) provides that this form of identification may be utilized "In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients." In light of the provisions of Rule 2-102, former L.A. Opinions 175, 181 and 200 are overruled to the extent they are inconsistent with this Opinion.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based

on such facts only as are set forth in the questions submitted.



DISCLOSURE OF VIOLATION OF RULES
--PROFESSIONAL CONDUCT--CONFLICT-
ING INTERESTS. An attorney has an ethical duty to reveal to the proper disciplinary authority all unprivileged knowledge of the conduct of a lawyer which he believes to be in violation of the California Rules of Professional Conduct or applicable sections of the Business and Professions Code. A lawyer representing a party in an action cannot without his client's written consent ethically undertake the representation of another party in an action against the client.

Rules and Canons: Rule 5-102(B), 4-101

ABA Canon 1, EC 1-4,
DR 1-102, DR 1-103(A)

The Committee has received two separate inquiries raising the same basic ethical question as to the duty, if any, of an attorney to report to the State Bar a breach of the Rules of Professional Conduct by another attorney. The two inquiries are being answered simultaneously although the factual situations in the two inquiries are somewhat different.

In the first inquiry, the inquiring firm indicates that certain violations of ethical conduct occurred when an employee-attorney kept legal fees without sharing them with the firm, in breach of an oral contract with the firm. In the second inquiry, an attorney first represented an insured in an action and, in subsequent litigation, filed while the first action was pending undertook to represent an opposing party against the insured, without the latter's consent. Both actions arose out of the same automobile accident.

In rendering this opinion, this Committee will assume, without making any determination thereon, that the conduct of the attorney in the first inquiry violated the California Rules of Professional Conduct. The propriety of the conduct of the attorney in the second inquiry in representing both the insured and his opposing party in two litigations is hereinafter discussed.

As to the common issue involved in these inquiries regarding the obligation of an attorney to report an ethical violation to the State Bar for disciplinary action, this Committee finds no such obligation imposed by the California Rules of Professional Conduct. No previous opinion of the State Bar Ethics Committee or of this Committee has been rendered on this subject.

However, the American Bar Association Code of Professional Responsibility imposes such a duty. DR 1-103(A) states:

"A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Section DR 1-102 referred to in DR 1-103(A) provides that a lawyer shall not "violate a disciplinary rule", nor "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation....(or) prejudicial to the administration of justice."

Canon 1 states as an axiomatic norm that a lawyer should assist in maintaining the integrity of the legal profession. EC 1-4 develops this further, stating:

"The integrity of the profession can be main-

tained only if the conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary.....".

In ABA Informal Opinion 1210, it was stated in response to an inquiry that members of the Minnesota Board of Professional Responsibility, governed by the ABA Code, had a "duty ... to report to the prescribed tribunal or authority any unprivileged knowledge of perpetration by a lawyer of a violation of any Disciplinary Rule, of illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, or other misrepresentation, conduct prejudicial to the administration of justice, and other conduct that adversely reflects on the fitness of the lawyer to practice law."

The Committee on Professional Ethics of the New York State Bar Association has held that an attorney is under a duty to report misconduct of an executor-attorney to the "appropriate authorities", if the misconduct is in violation of disciplinary rules. N.Y.S.B. Opinion No. 177 (1971).

Our Committee believes that the DR 1-103(A) above quoted is consistent with the highest level of professional responsibility and properly requires an attorney to protect the public from improper, unethical conduct of others by reporting such conduct to the State Bar for possible disciplinary action. Often it is only another attorney who is aware of such a violation, and without such reporting the public cannot be protected therefrom.

The Committee is of the opinion that there is an ethical duty to reveal to the proper disciplinary authority all un-

privileged knowledge of conduct of lawyers which an attorney believes to be in violation of the California Rules of Professional Conduct or applicable sections of the Business and Professions Code.

As to the question whether under the second inquiry here addressed, the facts show a violation of the Rules of Professional Conduct requiring a report by the inquiring attorney to the State Bar, this Committee is of the opinion that the facts do so indicate. Absent the consent of the insured to his lawyer's representation of an opposing party, a conflict of interest would exist giving rise to a violation by the lawyer of Rule 5-102(B). Assuming that the first litigation were terminated before actual representation of the opposing party began, there are such substantial conflicts that a written consent of the insured would also be required under Rule 4-101. It is reasonable to assume, and it is assumed for the purpose of this opinion that the attorney acquired confidential information in representing the insured regarding the accident.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the inquiry.

FEES - WITHDRAWAL - DELAY - REFUSAL TO DISMISS ACTION. An attorney must not make payment of his fee a condition precedent to dismissal of an action requested by his client. Under some circumstances an attorney may withdraw for non-payment of fees.



Rules and Statutes: Rule 2-111
Bus. & Prof. Code Sec. 6128

An opinion of this Committee has been requested with respect to whether an attorney may ethically delay the dismissal of a divorce action until his fees are paid. The inquiry presents a situation described as typical. The attorney has been retained to represent the wife in a Dissolution of Marriage. At the initial Order to Show Cause hearing, the attorney obtains an order for the payment of his fees by the husband, payment to be made in small monthly increments. At about the time the first payment is due, the couple reconciles; they instruct their respective attorneys to dismiss the action. Wife's attorney submits a bill to both spouses, combining the amount of the court order together with other costs incurred on behalf of his client. He accepts a payment of the court ordered amount by check drawn on an account held jointly by the spouses, crediting the client's costs and not the the order for fees. He then garnishes the husband's wages. Further, he refuses to sign a stipulated Dismissal form prepared by the other attorney. Finally, he files a motion for an accelerated payment of fees in a lump sum, at the same time requesting an additional fee for the preparation of this motion.

It is the opinion of this Committee that the facts pre-

sented do not afford any basis for an attorney to delay dismissal proceedings.

In Informal Opinion 1967-9, this Committee determined that an attorney's refusal to proceed with a matter following his client's request to proceed is analagous to withdrawal, and the same ethical considerations apply. Rule 2-111(C) prohibits an attorney from withdrawing except in certain limited situations. While one of the causes justifying withdrawal is the client's deliberate disregard of an agreement or obligation to pay expenses or fees, the facts stipulated in the inquiry do not support withdrawal on this ground. There is no suggestion that the client does not intend to pay her unpaid fees or costs incurred by the attorney. Nor is there any suggestion that the non-client spouse, against whom the court order runs, will fail to comply with the order for monthly payments. On the contrary, the facts stipulate a payment was made, apparently within a reasonable time to assume compliance with the court order.

In Opinion 1968-16 of the Committee on Professional Ethics of the State Bar, it is stated that an attorney who delays an action for divorce because of nonpayment of fees places himself in conflict with his client's legitimate interests in having the suit terminated with proper dispatch. The Committee there held that when a client deliberately disregards an obligation to pay fees, the lawyer may be warranted in withdrawing after due notice to the client, but that absent such withdrawal, it would not be ethical for the lawyer to delay the action until his fee was paid. The Opinion expressly finds that the attorney's ob-

ligation is the same whether the client is expected to pay or a court has ordered payment of the attorney's fees by the non-client spouse. In either case, the conduct of the attorney in delaying the action is improper.

In Opinion No. 261, this Committee also disapproved the conduct of an attorney in delaying the prosecution of a divorce action until his fees were paid. The ethical considerations do not differ in the present inquiry; delaying a dismissal would similarly constitute a direct violation of that part of the oath of office directing the attorney "to faithfully discharge the duties of such attorney and counselor". See also Informal Opinion 1966-4.

In Hulland v. State Bar (1972) 8 Cal.3d 440, it is stated at 448:

"When an attorney, in his zeal to ensure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client. (Citations omitted.) [His] willful failure to render the service for which he was retained and his assumption of a position contrary to his client's interests clearly warrants public reproof."

The conduct of an attorney in creating delay may also be criminal. Business and Professions Code section 6128 provides in relevant part:

"Every attorney is guilty of a misdemeanor who either:

....

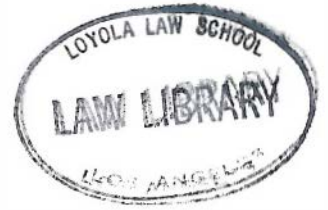
(b) willfully delays his client's suit with a view to his

own gain."

An attorney to whom a fee in a divorce case is owing may properly seek a modification of the order for payment or collect his fee by other appropriate methods subject, of course, to the ethical requirement that the fee be a reasonable one under Rule 2-107. Whether garnishment, acceleration or additional fee is appropriate is a question of law upon which this Committee offers no comment. In no case, however, may the attorney ethically delay dismissal of the action.

This opinion is advisory only. This Committee acts upon specific questions submitted ex parte and its opinion is based only on such facts as are set forth by the inquiring attorney.

OPINION NO. 357
(June 17, 1976)



MEDICAL LIENS - ATTORNEY AND CLIENT. A new attorney substituted into a personal injury case is not ethically bound to honor a medical lien granted to a physician by the former attorney and his client. He can pay the physician from the proceeds of the law suit only with his client's consent.

Rules: 5-104(A)(1)
8-101(A)(B)

ABA EC 7-9

An attorney asks the committee's opinion on the following:

Where a client substitutes a new attorney into a personal injury case, is the new attorney bound to honor a lien granted to physicians by the withdrawing attorney and by the client when represented by the former attorney? Also, does the new attorney act unethically or improperly by failing to pay the physician after using the bills and reports to obtain a settlement?

At the heart of this problem there is a legal question as to whether the instrument signed by the client creates a legal interest in the doctor either by assignment or as a lien on the recovery which is binding on the lawyer. It is beyond the jurisdiction of the Committee to determine questions of law. We limit our consideration of the attorney's conduct to the question of its ethical propriety, assuming that the lawyer is not bound by the lien.

ABA Informal Opinion 1295 reminds us that "Obviously the attorney must always keep in mind that his responsibility is to represent the interests of the client and not of the physician." Rule 5-104(A)(1) requires the clients' consent to pay third persons from the proceeds of the lawsuit. If the client consents, the physician's bill should be paid. If the client should withdraw such consent, "an insolvable conflict would arise." See Report of Joint Committee of the State Bar and the California Medical Association, 38 St. Bar Jour. 572 (1963). See Rule 8-101(A) and (B).

We agree with ABA Formal Opinion 163 that "however meritorious the claim, and however desirous the lawyer be to recognize it and assist in its collection, he may do so only with his client's consent." See also L.A. Informal Opinion 1966-5.

We do not believe that the new attorney is acting improperly in using the physician's bill and report to effect a settlement, even if the client is refusing to pay the bill. The physician has his legal remedies. If the attorney disapproves of his client's refusal, he may try to persuade the client to recognize the claim (See EC 7-9) or he may withdraw from the representation.

This Opinion is advisory only. The Committee acts on specific questions submitted ex parte, and as stated initially, this opinion is based on such facts only as are set forth in the questions submitted.

OPINION NO. 358
(JULY 21, 1976)



DISCLOSURE OF FINANCIAL INFORMATION
REGARDING CLIENT ELIGIBILITY BY LEGAL
AID ATTORNEY TO BOARD OF DIRECTORS.

A Legal Aid attorney may not disclose confidential financial information regarding a client's eligibility to the Foundation Board of Directors without the client's consent.

Rules interpreted: ABA Code of Professional Responsibility, EC 4-1, 4-2, 4-4, 4-6, DR 4-101(a), DR 4-101(b)(1), DR 4-101(c).

Cal. Bus. & Prof. Code Sec. 6068(e)

The client of a public legal services foundation furnished financial data to a non-attorney interviewer for use in determining the client's financial eligibility for services. The information was recorded on a client in-take sheet. During the staff attorney's representation of the client, the foundation's board of directors and executive director received inquiries from the adverse party and members of the community regarding the client's financial eligibility. As a result of these inquiries, the staff initiated an additional investigation of the client's eligibility including a review of documents related to his income and assets.

The board of directors, desiring to conduct its own investigation, requested the financial data which had been supplied by the client to the foundation. The executive director felt that the specific information constituted a confidence which was protected by the attorney-client relationship between the client and the foundation and declined to furnish the information requested. The executive director stated further that he was satisfied that the client was eligible and related the procedures taken to determine

the client's eligibility. The executive director also related that the client had refused to consent to disclosure. While the board of directors was attempting to obtain the information, the staff attorney concluded his representation of the client.

We are asked whether the executive director should reveal the information requested by the board of directors.

Two interests compete in the consideration of this issue. On one side of the balance is the foundation's board of directors, pledged to formulate and enforce foundation guidelines and standards. On the other side is the foundation's staff with its executive director, pledged to safeguard conversations with clients to preserve attorney-client communication. Canon 4 of the ABA Code of Professional Responsibility prohibits a lawyer from revealing confidences or secrets of a client. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (DR 4-101(A)). In the case before us, the client has requested that the information in the attorney's possession remain confidential, therefore, the requested information does qualify as a "secret" under DR 4-101(A) and cannot be revealed by the lawyer.

EC 4-4 and DR 4-101(B)(1) and California Business and Professions Code Sec. 6068(e) indicate that the scope of the lawyer's duty to his client's confidences and secrets is very broad. California Business and Professions Code Sec. 6068(e) states: "It is the duty of an attorney:.....To maintain inviolate the confidence, and at every peril to himself to preserve the secrets,

of his client." None of the exceptions listed in DR 4-101(C) apply to the facts of this inquiry.

People v. Canfield, 12 Cal.3d 699 (1974) indicates that the type of information requested by the board of directors does fall within the category of confidences or secrets which are protected. In the Canfield case the District Attorney attempted to obtain certain financial information from the Public Defender. The information sought was given by a Defendant to a non-attorney aide from the Public Defender's Office for the purpose of establishing eligibility. The Court, in holding the information to be privileged, stated:

"The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results." (emphasis supplied)

The Canfield case indicates that the facts that the information is given to a non-attorney, or that it is given prior to the case being accepted, are irrelevant.

Canfield also clearly indicates that such information could not be revealed to the opposing side in litigation.

"The absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent."

EC 4-4 states that the attorney's ethical considerations extend further than the attorney-client privilege and exist without

regard to the nature or source of information or the fact that others share this knowledge. ABA Formal Opinion 334 (August 10, 1974) stated explicitly that:

"A legal service lawyer may not disclose confidences or secrets of a client without the knowledgeable consent of the client."

The relationship among staff attorneys of a legal aid organization corresponds to that of law partners in the same firm. Confidences may be shared and cases discussed including identities of clients. An entirely different relationship exists between staff attorneys of a legal aid organization and its governing body. As stated in Los Angeles County Bar Opinion No. 339:

"the board's functions are limited to formulating broad goals and policies pertaining to the operation of the society and establishing guidelines respecting categories or kinds of clients staff attorneys may handle;once the attorney has accepted a client or case of the nature and type sanctioned by board policy the board must take special precautions not to interfere with its attorneys' independent professional judgment in the handling."

In ABA Informal Opinion 1208 the Committee stated:

". . . the loyalty of the lawyer runs to his client and not to the governing body."

While the board of directors' interest in remaining ac-

countable for staff actions is well founded and legitimate, that interest cannot outweigh the sanctity of the attorney-client relationship. The case law and precedent opinions make clear that the staff attorney cannot divulge his client's secrets to the Board. The privilege extends to non-attorneys who are subordinates to the attorney handling the case as well as to the attorney's partners and associates. (EC 4-5).

This opinion is advisory only. This Committee acts upon specific questions submitted ex parte, and its opinion is based only on such facts as are set forth by the inquiring attorney.



ADVERTISING AND SOLICITATION -
DIVISION OF FEES - LAY INTERMEDI-
ARIES. It is improper for a lawyer
who is an employee of a lay organi-
zation to render legal services to
other lawyers pursuant to an arrange-
ment between the lay organization and
the other lawyers.

Rules interpreted: Rule 2-104(B), Rule 3-101,
Rule 3-102; DR 5-107(B),
DR 2-103(B).

The Committee's opinion has been requested regarding
the following:

An attorney represents a Company which has as its
principal business function the leasing of trained office employees
to professionals. The Company proposes to hire attorneys for
placement in a law office. Under an employment contract with the
Company, the attorney - employees would be salaried by the Company
and the Company would retain the right to direct and control,
hire and fire the attorney - employees, although their day-to-
day direction and control would be delegated to the subscribing
law office. The employment contract may be terminated by either
party on two weeks notice. The attorney - employees would not
be doing legal work for the Company; they would be rendering
legal services to the clients of the subscribing attorney.

Assuming the proposed arrangement follows the same procedure as other personnel furnished by the Company, the subscribing law office would enter into a written agreement with the Company that the Company is to provide its employees (in this case attorneys) to the subscriber in accordance with specified terms and conditions. The subscriber agrees to pay a monthly fee to the Company as well as certain initial charges. In the event a subscriber is not satisfied, he must give two weeks notice to the Company in order that a replacement may be furnished. The agreement may be terminated by either party on thirty days notice. The Company retains the right to reassign any of its personnel but it must provide a replacement. The personnel are considered employees of the Company and not the subscriber for tax purposes.

Many of the questions raised by this inquiry were discussed by this Committee in its Formal Opinion 327. In Opinion 327 an attorney worked as an "independent contractor" for a legal research company which was controlled by laymen. This Company solicited legal research work from the legal community. All research services were performed by members of the State Bar. The researching lawyer would submit his bill to the Company and the Company would add its own fee and in turn bill the attorney who requested the research. In addition, the Company sought to provide the services of its independent contractor attorneys in making Court appearances on behalf of its attorney customers. This Committee held that

the acceptance of employment by an attorney as an independent contractor either for the purpose of making court appearances or in providing legal research in the manner described was improper.

The Committee in Opinion 327 stated that a lawyer should not accept employment by a Company to render services to its clients or customers which services would constitute legal services if rendered directly by the lawyer. The Committee further stated that even though it is proper for a lawyer to advertise for employment by other lawyers (subject to certain limitations, see Opinion 319), it would be improper for a lawyer to accept such employment as a result of advertising and solicitation by laymen. The Committee observed that the arrangement described in Opinion 327 made possible the exploitation of a lawyer's services and enabled laymen to profit from the rendering of such services.

The Committee also noted that if, under the facts, it may be said that there is a lawyer - client relationship between the lawyer - independent contractor and the lawyer requiring his services, then the conduct of the lawyer - independent contractor is improper in permitting a lay intermediary to intervene between himself and his client. Rule 2-104 (B) prohibits a lawyer from compensating an organization for securing his employment by a client. It has also been held to be improper for an attorney to knowingly accept professional employment offered to him as a result of the activities of any association that for compensation controls, directs or influences such employment (Opinion 270, and former Rule 3). DR 5-107 (B) provides that a lawyer shall

not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services. DR 2-103(B) provides that a lawyer shall not compensate a person or organization to recommend his employment by a client.

The Committee also stated in Opinion 327 that the activities of the Company might constitute the practice of law (a legal question beyond the Committee's function) and if so, the lawyer would be improperly aiding an unlicensed person to practice law. (See Rule 3-101 and Opinion 335 regarding the formation of a corporation by a doctor and lawyer to assist attorneys in malpractice cases.)

In the present inquiry, this Committee must determine if the objections stated in Opinion 327 apply (see also Opinions 335 and 319).

Even if we assume that employment of the attorney-employee can be provided without improper advertising or solicitation and that the leasing company is in no way engaged in the unlawful practice of law, at least two problems are presented by the present inquiry. The first is that the arrangement does involve the sharing with a lay organization of compensation arising out of professional employment in violation of Rule 3-102. In Opinion 194, this Committee held that it was improper for an attorney to render a legal opinion to a lay consulting firm for a fee which in turn passed the opinion on to its customer at a higher fee. The same conclusion was reached in Opinion 327. The fact that the "customers" are other lawyers did not change that conclusion (see also Opinion 335). In the opinion of this Committee, the arrangement described in the present inquiry is im-

proper for the same reasons expressed in these prior opinions.

A second objection to the arrangement arises from the fact that the leasing company retains control over the lawyer even though supervision of the lawyer's day to day activities is by the subscribing attorney. The Company has the right to reassign the lawyer to another subscriber or to terminate him. In this manner the lawyer is in a position where his professional services and judgment may be subject to the control, interference or influence of another organization.

Whether or not there may be violations of other rules depends on facts which are not presently before the Committee.

This opinion is advisory only. This Committee acts upon specific questions submitted ex parte and its opinion is based only on such facts as are set forth by the inquiring attorney.

ATTORNEY AND CLIENT - DUTY
TO FORMER CLIENT - AUDIT LET-
TER. It is improper for a dis-
charged attorney to condition
the delivery of information to
the former client's auditor on
payment of statements for past
legal services, although he may
insist upon reasonable compensa-
tion in respect of such new serv-
ices, if the client is able to
pay, including, if appropriate, a
reasonable advance on such compen-
sation.



California Rules: 2-107, 2-111

ABA Disciplinary Rule: 2-106

ABA Ethical Considerations: 2-17, 2-18, 2-26

Inquiry is made on behalf of a law firm (the "Law Firm") which rendered services to a corporation until the termination of its employment pursuant to an internal reorganization of the client corporation. Payment in respect of services rendered to the corporation prior to such termination has not been made, and it is likely that the matter will have to be litigated. The Law Firm has recently received a standard form of request for an audit letter relating to contingencies affecting the corporation known to the Law Firm. The corporation must provide reports as to its financial position and operations to a California state agency having regulatory jurisdiction over it. The Law Firm indicates that a substantial expenditure of time would be required to provide the requested audit letter.

The Law Firm suggests four possible responses to the audit letter request, namely: (1) silence; (2) furnishing the requested audit letter, with or without further billing; (3) indicating to the corporation that the audit letter will be furnished when the outstanding obligation to the firm has been satisfied (or suitable arrangements made) and upon payment of an advance for the anticipated fees for the additional services in connection with the audit letter; and (4) indicating to the corporation that the services requested will be provided upon payment of an advance against estimated fees for such further services. The Law Firm indicates that the latter two alternatives are the only ones it is seriously considering, and that its inclination is to adopt alternative (3) above as the only basis upon which it would be willing to accommodate the corporation.

The inquiry presents questions as to: (1) the duties of an attorney discharged by a client to furnish information to a third party subsequent to such employment; (2) the right of the attorney to compensation for services rendered in connection with the furnishing of such information, including the right to insist on advance payment; and (3) the right of the attorney to exact conditions to the performance of such post-discharge services additional to receipt of a reasonable fee for such services.

(1) An attorney is under a duty, following discharge by his client, to impart information to third parties at the request of the former client. See L.A. Opinion 330, to the effect that an attorney is under a duty to impart information to a new lawyer for the former client, regardless of whether past due bills for legal services have or have not been paid. An attorney should be especially sensitive to this duty where refusal to supply the information could reasonably be expected to result in serious prejudice to the former client. Thus it seems clear, and is assumed, that the new services are not services that can be provided by another law firm or lawyer, because they are so closely related to the past services and because in fact they call specifically for the knowledge and judgment of the attorney. Furthermore, it can be fairly assumed, and is assumed, that withholding the new services would be likely to have, or might have, serious prejudicial consequences for the client, such as an auditor's opinion qualified as to "scope", embarrassment or worse vis-a-vis the California agency with regulatory jurisdiction over the client corporation, difficulties in completing the audit, or other difficulties. Under such circumstances, it would be inappropriate for an attorney to threaten to withhold the new services, except in the situation where the client is able to pay a reasonable fee for these new services and refuses to do so, as described below, or in some other situations where such refusal is permitted under the ethical rules which do not appear to be the case here.

(2) The furnishing of information at the request of the former client to the former client's auditor constitutes new employment, for which the attorney is permitted to charge a reasonable fee. The fee charged should not be "unconscionable", as prohibited by California Rule 2-107, or more than reasonable, as prescribed in ABA Ethical Consideration 2-17. See ABA Disciplinary Rule 2-106. ABA Ethical Code 2-18 discusses the factors involved in determinations as to the reasonableness of a fee.

The foregoing assumes that the client is able to pay. (See L.A. Opinion 251, which indicates that, although it is sometimes stated that inability to pay can only occur where the client is a natural person, this is not exclusively the case.) While an attorney being requested to perform new services for a new client might have the right to decline where he would not receive a reasonable fee because of inability to pay on the part of the client (although such refusal should be reluctant, as suggested in ABA Ethical Consideration 2-26), refusal to perform the services in the inquiry under discussion because of inability to pay on the part of the client would not be proper. Inability on the part of the client to pay is not a ground of withdrawal under Rule 2-111(C), and the situation under discussion is more closely analogous to withdrawal than to that of a wholly new lawyer-client relationship because of the past relationship, the relationship of the new employment to past services, and the probability that failure to perform the new services would be seriously prejudicial to the client, as indicated above.

However, inability to pay should not be confused with willful refusal to pay. Thus California Rule 2-111 (C) lists the permissible bases for withdrawal by a member of the State Bar, and Rule 2-111(C)(1)(f) permits withdrawal where the client ". . . deliberately disregards an agreement or obligation to the member of the State Bar as to expenses or fees; . . .". But he cannot, as indicated, withdraw under circumstances seriously prejudicial to his client. See L.A. Opinions 32 (1925) and 211 (1953) which deal with fee disputes, rights to withdraw, and the effect of prejudice to the client of withdrawal. (As indicated above, although the situation under discussion is not one of withdrawal, the governing considerations are similar, for the reasons set forth above.)

In undertaking new employment, it may in some circumstances be appropriate, and consistent with fee arrangement reasonableness, to require a reasonable advance or retainer in respect of services to be rendered. In the case under discussion, the prior failure to pay fees, which the inquiry suggests is not due to dissatisfaction with the services or inability to pay but to an internal reorganization in the client corporation, indicates the appropriateness of a reasonable advance or retainer arrangement.

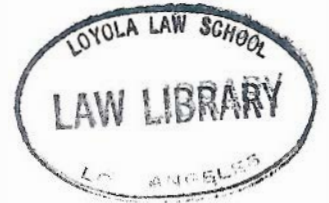
(3) The attorney may not, however, condition performance of the new services upon payment of his past due bill for services previously performed, or on any other payment (except reasonable compensation for the new services). The alternative suggested by the attorney (alternative (3)) involves both compensation for the new services and payment of past due bills. Where the client would be seriously prejudiced by the lawyer's refusal to perform the services (which generally occurs because the proposed services are inherently related in some way to past services of the same lawyer so that the client has become dependent upon such lawyer), the lawyer should be especially careful to avoid even the appearance of coercion; he should not exact, as a result of his superior bargaining position, concessions in addition to a fair and reasonable fee as by threatening to withhold the services if the requested concessions are not forthcoming. Such overreaching would raise problems under Rule 2-107, and the threat to withhold services, even if implicit, would be contrary to the spirit at least of Rule 2-111(A)(2) as being equivalent in substance to a threat to withdraw under circumstances where withdrawal would be ethically proscribed as prejudicial to the client. Rule 2-111(A)(2) states that, "In any event, a member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, . . .".

In Academy of California Optometrists Inc. v. Superior Court of Sacramento County, 51 C.A.3d 999 (3d Dist. 1975), the Court stated that, although California Rule 2-111(A)(2) relates to withdrawal, it applies with no less force to the discharge of an attorney, the duty to the client being not "altered by the circumstances of who terminates the relationship". 51 C.A.3d at 1005-6.

Accordingly, the Committee believes that the arrangement suggested in alternative (3) is improper, but that the arrangement suggested in alternative (4) is proper so long as the advance arrangement is reasonable and so long as the attorney has no reason to believe that the client is not able to make the advance or pay the fee.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and as stated initially, this opinion is based on such facts only as are set forth in the question submitted.

OPINION NO. 361
(JULY 21, 1976)



CONFIDENTIAL COMMUNICATIONS -
DIVISION OF FEES - SALE OF LAW
PRACTICE - SOLICITATION. An
agreement for the sale and trans-
fer of a law practice is ethic-
ally improper.

Rules: 2-101, 2-111(A)(2), 3-102

ABA Code DR 2-107(A)(2), EC 4-6

B & P Code Section 6068(e)

A sole practitioner, engaged in an estate planning practice, inquires whether a plan which he is considering "for the orderly sale and transfer of open files and Will files (where potential fees may be substantial)" is ethically proper. The plan consists of a written agreement with an attorney whom he deems able to adequately provide legal services to the inquiring attorney's clients. The plan provides that upon the death of the attorney all such files will be purchased by the second attorney who will pay the attorney's estate a sum equal to one-third of all fees received for his legal services to be rendered to the deceased attorney's former clients when the Will files mature.

The Committee is of the opinion that the proposed agreement for the sale of the attorney's law practice is ethically improper and may be void. The good will of the practice of a lawyer is not, of an in itself, an asset which either he or his estate can sell. As said by the New York County Committee in Opinion 109, "Clients are not merchandise. Lawyers are not tradesmen. An attempt, therefore, to barter in clients would appear to be inconsistent with the best concepts of our professional status." ABA Opinion 166.

The proposed agreement contemplates a violation of Rule 3-102 which states that a member of the State Bar shall not directly or indirectly share legal fees except with a person licensed to practice law. In this instance, the decedent's estate is an unlicensed entity. This Committee and numerous others under former Rules and Canons have so held. L.A. Opinion No. 162, ABA Opinion 266, ABA Informal Opinion 648, N.Y. City 272 and 679, N.Y. State 366, Illinois State 310, Texas State 264; see also Drinker, Legal Ethics, p. 189, ABA Code DR 2-107(A)(2), EC 4-6. The exceptions to this rule set forth in Rule 3-102 are not applicable.

A further violation may occur after the transfer of the deceased lawyer's files, without the consent of the clients involved, if and when the wills and files are inspected by the purchasing lawyer. B & P Code Section 6068(e) requires that the secrets and confidences of clients be held inviolate. Also, if the purchasing attorney were to offer his services to the deceased lawyer's clients and inform them that he had purchased their former attorney's practice, such conduct would constitute solicitation in violation of Rule 2-101. The deceased attorney's clients have an absolute right to select other counsel and to demand that these files be turned over promptly to the lawyer whom the client may designate. L.A. Opinion No. 348.

Although questions of law are beyond the province of this Committee, it should be noted that in Geffen V. Moss,

53 Cal.App. 3d 215 at 277, 125 Cal. Rptr. 687 at 694, the Court stated: "The attempted sale of the expectation of future patronage by former and current clients of a law office, coupled with an agreement to encourage said clients to continue to patronize the purchaser of the physical assets of the office, under the facts of this case, may well be said to constitute an attempt to buy and sell the good will of a law practice as a going business, contrary to public policy, and that portion of the agreement purporting to do so is invalid and unenforceable." See also Academy of California Optometrics vs. Superior Court, 51 Cal. App. 3d 999 at 1006, 124 Cal. Rptr. 668 at 672, the Court stated "Contracts which violate the canons of professional ethics may for that reason be void...."

It should also be noted that effective January 1, 1975, Article II (Section 6180 et seq) entitled, "Cessation of Law Practice - Jurisdiction of Courts" was added to the Business and Professions Code. It provides for the care of unfinished client matters when no member of the Bar, with the consent of the client, has agreed to represent clients of a lawyer who dies, resigns, becomes an inactive member, is disbarred or suspended from the active practice of law.

This opinion is advisory only. The Committee acts upon specific questions submitted ex-parte and its Opinion is based upon facts only as set forth in the questions presented.

OPINION NO. 362
(October 20, 1976)



WITHDRAWAL OF REPRESENTATION - SUIT FOR FEES - OFFICE FILES.
It is proper for a lawyer representing a client involved in litigation to file a motion to withdraw as counsel for good cause. After the motion is granted and the withdrawal effected, the attorney may initiate a suit against the client for unpaid fees. The attorney must return to the client all of the documents in the attorney's files prepared or paid for by the client, and make the remainder of office files regarding the client's matters available to the client and its agents. The matter of who bears the cost of making copies is a legal question which the Committee does not answer. (Opinion 330 modified)

Rules Interpreted: Rules of Professional Conduct,
2-111(A)(2)
2-111(C)(1)

ABA Code of Professional Responsibility,
DR 7-102(A)
EC 2-16
EC 2-32
EC 2-23

An attorney currently represents an individual and corporations controlled by the individual in various litigation matters. The individual client has with increasing regularity made statements which the attorney believes are contrary to fact and has insisted that the attorney take positions contrary to the attorney's interpretation of the evidence. The client may be insolvent and there are substantial fees and costs for past work owing to the attorney, which the attorney believes will not be paid. The attorney has requested the Committee's opinion on the ethical propriety of the following matters:

1. The filing of motions in pending litigation to withdraw as counsel for the individual client and the corporations controlled by the client;

2. The initiation of a lawsuit by the attorney against the client for costs and fees pending a ruling on the motion to withdraw; and

3. If the motion to withdraw as attorney is granted, the extent to which the attorney must provide the client with access to the attorney's office files relating to the client's matters.

An attorney may ethically withdraw only on the basis of compelling circumstances and only in a manner which protects the welfare of the client. Rule 2-111(A)(2); EC 2-32; Drinker 140-41.

Rule 2-111(C)(1) provides that a member of the State Bar may not request permission to withdraw in matters pending before a tribunal unless the withdrawal is because his client:

"(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(b) Personally seeks to pursue an illegal course of conduct; or

(c) Insists that the member of the State Bar pursue a course of conduct that is illegal or that is prohibited under these Rules of Professional Conduct or the State Bar Act; or

(d) By other conduct renders it unreasonably difficult for the member of the State Bar to carry out his employment effectively; or

(e) Insists, in a matter not pending before a tribunal, that the member of the State Bar engage in conduct that is contrary to the judgment and advice of the member of the State Bar but not prohibited under these Rules of Professional Conduct or the State Bar Act; or

(f) Deliberately disregards an agreement or obligation to the member of the State Bar as to expenses or fees"

The Committee is of the opinion that it is ethically proper for the attorney to file motions to withdraw with the respective courts in which the client or the corporations controlled by the client are being represented by the attorney, provided that prior to withdrawal of representation, the attorney has taken reasonable steps in accordance with Rule 2-111(A)(2) to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing for employment of other counsel, and delivering to the client all papers and property to which the client is entitled. If the client has requested the attorney to take a position which the attorney cannot in good faith support, sub-section 1(a) of Rule 2-111(C) permits the attorney to seek to be removed. Moreover, if the position which the attorney is requested by the client to take with respect to the litigation is contrary to the facts known to the attorney, a motion for withdrawal would be appropriate pursuant to sub-section 1(c) of Rule 2-111(C). See also, DR 7-102(a)(2), (5), (6) and (7); and L.A. Opinion No. 1974-7, which provides that an attorney should withdraw if a client insists on false evidence being presented at trial. No opinion, however, is expressed regarding the judgment to be rendered on the motions for withdrawal.

With respect to the accrued fees and costs owed the attorney, non-payment of reasonable fees by the client to the attorney may be deemed in some circumstances to be sufficient

reason to seek withdrawal of the attorney under Rule 2-111(C)(1)(f). However, if the failure to pay agreed-upon fees is due to the insolvency of the client, it would be ethically improper for the attorney to seek to withdraw on that ground alone. L.A. Opinion No. 251; EC 2-16.

Although Rule 2-111(A)(2) requires a withdrawing attorney to deliver to the client all papers and property to which the client is entitled, neither the Rules of Professional Conduct nor the Code of Professional Responsibility expressly covers the subject. L.A. Opinion No. 330, however, states that a withdrawing attorney must release to the client or to the client's agent all of the original papers and documents belonging to the client, including deposition transcripts, expert reports or other documents which have been paid for by the client, and that all of the papers constituting the withdrawing attorney's office files relating to the client's matters must be made available to the former client and the succeeding attorney. Moreover, the ethical duty with respect to releasing the office files of the withdrawing attorney should not fluctuate based on whether the attorney is fully paid, partially paid, or unpaid. See Weiss v. Marcus, 51 C.A. 3d 590, 599; 124 Cal. Rptr. 297, 304 (1975). See also Academy of California Optometrists, Inc. v. Superior Court 51 C.A. 3d 999, 1006; 124 Cal. Rptr. 668, 672 (1975) wherein the trial court was directed to enter an order commanding the former attorney "to forthwith deliver to petitioner all files, documents, and papers in his possession relating to the action".

The Committee expresses no opinion on who must bear the cost of copying material delivered to the former client; this matter of cost is, in the opinion of the committee, a question of law the answer to which may depend upon the particular facts or documents involved. This Committee's Formal Opinion 330 is modified to the extent it is inconsistent with this opinion.

Although a lawyer should be zealous in his efforts to avoid controversies over fees with clients and should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client, it is the opinion of this Committee that an attorney may properly sue a client for services rendered if he withdraws as attorney for the client. L.A. Opinion No. 109, EC 2-23. However, because a lawyer must represent a client zealously within the bounds of the law, the Committee is of the opinion that an attorney should withdraw from all matters in which he represents the client prior to commencement of litigation against the client to secure payment of costs or fees. L.A. Opinion No. 212.

This opinion is advisory only. The Committee acts upon specific questions submitted ex parte, and its opinion is based upon facts only as set forth in the questions presented.

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FORMAL OPINION NO. 363
(October 25, 1976)

ADVERSE INTERESTS - SIDE SWITCH-
ING BY ASSOCIATE OF LAW FIRM.

Law firm should not continue to represent defendant after association of former associate of attorneys for plaintiff even though associate does not participate in the litigation, unless: (1) defendant consents, and (2) plaintiff consents or it is abundantly clear that associate was not privy to plaintiff's confidences. (Opinion 252 disapproved).

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Rules Interpreted: Rules of Professional
Conduct - 4-101, 5-102

B & P Code 6068 (e)

Code of Professional
Responsibility -
EC 4-2, EC 4-6,
DR 4-101, EC 9-2, Canon 9.

The Facts

An associate of a law firm representing plaintiff ("Plaintiff's Firm") notifies the firm he is leaving to become an associate of the law firm representing the defendant ("Defendant's Firm") in the same case. The associate also tells Plaintiff's Firm he will have nothing to do with the case. Plaintiff's Firm makes no objection to the associate's plans.

While with Plaintiff's Firm, and before he knew who the parties were, the associate was asked his opinion about the case. Later, he was asked to work on the file, and then learned for the first time that a defendant was the associate's old friend and personal doctor. The associate immediately told Plaintiff's Firm he could not work on the case because of his

relationship with the defendant. In all, the associate spent between 15 to 30 minutes billed to the case by Plaintiff's Firm. In addition, while still with Plaintiff's Firm, the associate represented the plaintiff at a deposition unrelated to this case; at that time, the associate told the plaintiff that the associate would not be able to represent plaintiff in this case because one of the defendants (left unidentified) was the associate's personal doctor.

Before he joined Defendant's Firm, the associate told the defendant of his move, and that he would not be working on the case in order to avoid even the appearance of representing adverse interests. The defendant said he understood, and did not object. Beyond telling Defendant's Firm that he would not be able to work on the case because of his former association with Plaintiff's Firm, the associate has not discussed the case with Defendant's Firm, and has never seen either their file or the court file in the case.

The associate will not work on the case, but Defendant's Firm has asked him to inquire whether these facts present any problem of conflict of interest, and whether any additional steps should be taken.

Preliminaries

1. The failure of Plaintiff's Firm to object when it first learned of the associate's plan to associate with Defendant's Firm would not prevent plaintiff from raising the matter later on. Earl Schieb, Inc. v. Superior Court, 253 Cal. App. 2d 703 (1967); see also Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2 Cir., 1973). Similarly, lack of immediate objection by the defendant would not eliminate questions of propriety.

2. While the key figure in this inquiry is or was an associate of both firms, connection with the case rather than rank in the pecking order is decisive. In considering how a lawyer's ethics affects his client "...we do not believe that there is any basis for distinguishing between partners and associates on the basis of title alone - both are members of the bar. . ." Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp., 518 F.2d 751, 756 (2 Cir., 1975). In gauging the effect upon the litigants of the associate's change of law firms, we consider plaintiff and defendant as successive clients of the associate.

3. The Rules of Professional Conduct deal separately with a lawyer's conduct as it affects a first client (Rule 4-101) or the second (Rule 5-102). On the present inquiry, the effect on the second client (defendant) is minimal, and we deal with that problem first.

Second Client

Rule 5-102(A) recognizes the basic fiduciary responsibility of the lawyer to deal openly with his client, requiring disclosure of "his relation, if any, with the adverse party" and any interest he may have in the matter. The associate has already taken this appropriate first step. The Rule requires one further step: a formal and precautionary acknowledgement that the defendant is satisfied with the new arrangement. The defendant's "written consent" should be obtained. (See also EC4-2.)

First Client

The Rules of Professional Conduct (Rule 4-101) tie together the ethics of adverse employment and the duty of preserving client confidences (B & P Code § 6068(e)). Under the language of Rule 4-101, it is not every employment adverse to a first client that is forbidden absent "informed and written consent." As stated, the prohibition applies only if work for the second client relates "to a matter in reference to which he [the lawyer] has obtained confidential information by reason of or in the course of his employment" by the first client. In this respect, the new Rule continues old Rule 5, applied in Arden v. State Bar, 52 Cal. 2d 310, 341 P.2d 6 (1959). The Code of Professional Responsibility does not make this same distinction. Nonetheless, some federal cases have arrived at a similar result by interpreting together DR 4-101 (confidences) and Canon 9 (appearance of impropriety); they say that a lawyer may not represent a second client adverse to a first client in a matter "substantially related" to the first representation. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2 Cir., 1973). If the matters are "substantially related," confidences will be presumed rather than inquired into, lest the inquiry itself destroy the confidence. (See Hull v. Celanese Corporation, 513 F.2d 568, 2 Cir., 1975).

Representation in Unrelated Case

The fact that the associate here at one time directly represented the plaintiff at the taking of a deposition, but in an unrelated case, would not present any difficulty under either the California Rules or the "substantially related"

rule. If there were confidences exchanged in the earlier matter, it is still not "the matter" that is now being litigated, nor connected with it. Absent some such a connection, the client has no right to restrict the associate's later employment.

See Kraus v. Davis, 6 Cal. App. 3d 484 (1970), Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp., 518 F.2d 751, 757 (1975), Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9 Cir., 1976), see also Bonus Oil Co. v. American Petrofina Co., 1975 Trade Cases ¶ 60,315 D. Neb., Redd v. Shell Oil Co., 1974-2 Trade Cases ¶ 75,392, reversed in 518 F.2d 311 (10 Cir., 1975).

Side Switching

The greatest concern raised by the inquiry is the degree to which earlier employment by the associate may affect his later employment in the same case (as here), or a related case. The decision affects both clients, the young lawyer's employability, the mechanics of operation of large law firms, and the public's estimate of the profession. (In our view the considerations affecting lawyers joining private firms after leaving government employment involve policy matters not raised by this inquiry, and this opinion does not reach the problems of DR 9-101(B). See ABA Formal Opinion No. 342 (Nov. 24, 1975), and cf. Opinion 16 and Tentative Draft Opinion for Comment Inquiry 19, Committee on Legal Ethics of the District of Columbia Bar, 1 District Lawyer 39-44 (Fall, 1976); see also B & P Code § 6131).

Where the "substantially related" rule is applied, courts have also considered whether the switching lawyer himself had a substantial or minimal connection with the representation of the first client. See Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp., 518 F.2d 751, 755 (2 Cir., 1975). Thus in Gas-A-Tron, supra, an associate of a firm that handled many matters for Shell and Exxon later became associated with a firm that filed an anti-trust action against Shell and Exxon. Disqualification of the associate and the second firm were reversed, for the reason that the associate's work for the first firm had been in matters unrelated to the pending litigation, and he was not privy to the confidences of the oil companies contained in the general files of his first employer. The case suggests the possibility that what may have been forbidden to his first employer was not forbidden to the associate, not because he was only an associate, but because of his lack of exposure to the client's confidences.

The facts in the inquiry show that the associate here had not over a half hour's exposure to the plaintiff's case, but they do not rule out the possibility that the brief contact made him privy to confidential information obtained directly by Plaintiff's Firm, and mediately by the associate, "by reason of or in the course of" employment by plaintiff (Rule 4-101). Plaintiff has the right to expect that those confidences will be respected even after the associate leaves the firm. B & P Code § 6068(e); see also EC 4-6, EC 4-2, and DR 4-101.

The ultimate question is whether or not plaintiff's expectancy of confidentiality can be satisfied by advice "that the party transferring will not participate further in the pending controversies, and will not disclose any of the confidences acquired in his former employment pertaining to these same matters." Under similar circumstances, L.A. Opinion No. 252 (1958) said that that would suffice and that there would be no impropriety. That view makes for employability, eases the problems of the hiring firm acting in good faith, and permits a consenting second client to keep the lawyers of his choice.

A later L.A. Opinion No. 269 (1962) discussing the old Canons of Professional Ethics (Canons 6, 29, 37) and the old Rules of Professional Conduct (Rules 5, 6, 7) on confidentiality and adverse and conflicting interests, observed that the Committee "has also seen fit to depart from a strict interpretation of said Rules and Canons under certain circumstances." It said of Opinion No. 252 that "here again the strict rule was not adhered to."

This Committee disapproves of Opinion No. 252 to the extent that it is inconsistent with the conclusions expressed herein. We feel that the first client, here the plaintiff, would justifiably take a dimmer than ordinary view of an unfavorable outcome of his lawsuit when he pondered the fact that a former associate of his law firm had been in the enemy camp. As stated in another connection in L.A. Opinion No. 216 (1953), "Joint occupancy of a suite gives rise to an assumption by the public that the two lawyers are related professionally, even though no partnership exists, and permits an inference of col-

laboration . . . To avoid the appearance of impropriety, exceptional circumstances, not apparent here, would have to exist." We are of the opinion that preservation of a client's confidences, and reinforcement of the client's feeling of assurance that the confidence will be kept, outweigh considerations of easing the mechanics of later employment, and outweigh even the possibility that another litigant and a good faith employer may suffer by innocent association with an equally good faith carrier of unwanted confidences.

If it is clear that the associate will not have any connection with the case so that any appearance of impropriety will be negated, and if it is abundantly clear that the associate did not receive any of the plaintiff's confidences during his tenure with Plaintiff's Firm, Defendant's Firm may proceed with the representation of the defendant without the written consent of the plaintiff obtained through his counsel. Otherwise not.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its Opinion is based on only those facts set forth in the question submitted.

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FORMAL OPINION NO. 364
(December 15, 1976)

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OPPOSING COUNSEL - PROFESSIONAL CONDUCT - REFUSAL TO EXTEND PROFESSIONAL COURTESIES.

It is improper for a group of attorneys to circulate the names of other lawyers who fail to afford professional courtesies. The errant attorney may be of concern to the organized bar, but reciprocal treatment demeans the entire profession.

Rules interpreted: ABA Code EC 1-5, 7-38

An attorney has asked whether it would be proper to form a group of lawyers to circulate the names of other attorneys who do not extend normal courtesies, such as a continuance or stipulation, for the purpose of a group-action response in kind. It is the opinion of this Committee that formation of such a group, or even an individual response which is intended to harass, is improper. This conclusion stands independently of any substantive analysis of any questions of law.

Although it is to be wished that all lawyers be courteous to opposing counsel and accede to reasonable requests regarding continuances, procedural formalities and similar matters, as recommended by ABA Code EC 7-38, an agreement among lawyers to boycott those who do not extend such courtesies is in effect an equally inappropriate indulgence by the group of lawyers in the very conduct they wish to condemn. See also Former ABA Canon 24.

An attorney's responsibility is otherwise directed by ABA Code EC 1-5: the appropriate response is to encourage the fellow lawyer to adopt that high standard of conduct and integrity to which all lawyers hopefully adhere.

The repeated failure of a particular attorney to accord those courtesies which are usual may, at some point, become of concern to the organized bar in fulfilling its obligation to review errant conduct by a member of the bar. No individual or group of attorneys should appoint themselves, however, to administer the sanction of engaging in the same errant conduct. Such efforts do not enhance the stature of the profession, and are unworthy of those who should be brethren at the Bar.

This Committee has stated that the absence of a rule or canon that is specifically applicable to certain conduct does not mean that such conduct is ethical. L.A. Opinion Nos. 63 and 339.; see also Rule 1-100. The duty of an ethics committee is to advise attorneys as to conduct which, as indicated in the preamble of the ABA Code of Professional Responsibility, meets "the objectives toward which every member of the profession should strive."

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the question submitted.

NOTE: To adopt authority from a source entitled "When I went to the Bar", this inquiry is capable of resolution in the following lines:

In other professions in which men engage
 (Said I to myself-said I)
 The Army, the Navy, the Church, and the Stage
 (Said I to myself-said I),
 Professional license, if carried too far,
 Your chance of promotion will certainly mar--
 And I fancy the rule might apply to the Bar
 (Said I to myself-said I!). (1)

(1) "Iolanthe" by Sir William Gilbert

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FORMAL OPINION NO. 365
(April 20, 1977)

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ADVERSE PARTY - COMMUNICATION OR
NEGOTIATION WITH: A member of the
State Bar may not, without the con-
sent of opposing counsel, sanction
an attempt by his client to reach
a compromise settlement by direct
communication with the adverse
party.

Rule interpreted: Rule 7-103, California
Rules of Professional
Conduct

The Committee has received the following inquiry:

"In an attempt to resolve by way of settlement a lawsuit involving certain rights in a patent, the defendant concluded that plaintiff's attorney may be deliberately interfering with the possible resolution of the dispute. The defendant has proposed to discuss settlement directly with the plaintiff. Defendant's attorney has made known to plaintiff's attorney the desire and intention of the defendant to discuss settlement directly with the plaintiff. Defendant is willing to conduct such conversation whether with plaintiff's attorney present or not, as plaintiff may prefer, except that if plaintiff's attorney is present defendant will also wish to have his attorney present. Plaintiff's attorney has responded by threatening to sue defendant and defendant's attorney for interference with contractual relationships if defendant communicates directly with plaintiff.

"Is there any violation of the canons of ethics or rules of professional conduct (or any other proscription) that

would preclude the defendant from communicating directly with the plaintiff with regard to settlement of the litigation between them."

Since the Committee does not pass upon questions of law (L.A. County Formal Opinion 275), it expresses no opinion on whether the contemplated communications would constitute a violation of applicable law.

With regard to whether the contemplated communications would be ethically improper, Rule 7-103 of the California Rules of Professional Conduct provides, in pertinent part:

"A member of the state bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of said counsel."

A.B.A. Formal Opinion 75 held that an attorney cannot, without the consent of opposing counsel, sanction an attempt by his client to reach a compromise settlement by direct communication with the adverse party. This opinion was based on an interpretation of Former A.B.A. Canon 9 which prohibited an attorney from communicating upon the subject of controversy with a party represented by counsel. Rule 7-103 is, if anything, broader in its language in that it prohibits direct or indirect communications with a party represented by counsel.

It should be noted that the Rules of Professional Conduct govern the conduct of members of the Bar, not their lay clients. However, as stated in A.B.A. Formal Opinion 75, an attorney should not advise or sanction acts by his client

which he himself should not do. If the client should suggest direct negotiations with the other party, without the consent of the adversary's attorney, it is the duty of the attorney to attempt to dissuade his client from doing so. See also A.B.A. Formal Opinion 95 and L.A. Informal Opinion 1966-16.

The Committee is of the opinion that the duty imposed on the attorney by A.B.A. Formal Opinion 75 is equally applicable to this inquiry. In the circumstances, the attorney should make every effort to dissuade his client from direct negotiations with the adverse party.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and the opinion is based on such facts only as set forth in the questions submitted.

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OPINION No. 366
(April 20, 1977)

LOS ANGELES COUNTY BAR ASSOCIATION
1212 CITY NATIONAL BANK BUILDING
606 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014

CONFLICTING INTERESTS - CONFIDENTIAL
COMMUNICATIONS - WITNESSES - WITHDRAWAL

Where an attorney has been consulted in confidence by one defendant who will now be a witness for the prosecution against other former co-defendants, the attorney may not ethically represent any of the remaining co-defendants.

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Rules interpreted: Rules of Professional
Conduct, 4-101

Business and Professions
Code, Sec. 6068 (e)

A member of the Bar has asked the Committee's opinion on the following:

Recently several persons were charged with the crime of murder. One of these consulted the attorney seeking representation. After "two brief interviews," during which the prospective client's version of the events leading to the charge was related to the attorney, a determination was made not to represent the client. No notes of the interviews were made. Subsequently, that prospective client was granted immunity, and will be a witness for the prosecution against remaining defendants. One of the remaining defendants has indicated a desire to have the attorney as defense counsel. The attorney indicates that he has no information from the interviews that has not since been given to the prosecution pursuant to the immunity grant. The attorney urges us to consider the willingness of the remaining defendant to waive any conflict of interest, the defendant's indigency, and the defendant's specific request for him as defense counsel. The attorney asks whether he may ethically represent one of the remaining defendants under these facts.

We are of the opinion that the attorney may not properly represent any of the remaining defendants. Section 6068(e) of the Business and Professions Code requires lawyers "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client." We think that the first client is protected by Section 6068(e) where confidential information is given to the attorney in the initial conference before actual employment, or where, as here, no employment ensues. See Evidence Code Section 951 ("Lawyer-Client Privilege"), which defines a client as a person who "...consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." See, also, Law Revision Commission Comment to Sections 950, 951 of the Evidence Code.

Rule 4-101 prohibits a lawyer from accepting employment adverse to a former client without that former client's informed and written consent. We see no reason to distinguish between a client who later employs the lawyer and a client who consults and obtains advice only. In our opinion the attorney cannot accept the representation of a new client where he has obtained confidential information from a former client who will be an adverse witness to the new client. His duty to the defendant on trial would require him to vigorously cross-examine the former client about matters previously disclosed in confidence.

In our view, the grant of immunity by the prosecution, or the disclosure of the same facts to them, does not alter or affect the requirements of Rule 4-101. The duty imposed by

Section 6068(e) of the Business and Professions Code continues also. See Evidence Code Section 955; People v. Dorrance, 65 C.A. 2d 125 (2944); People v. Singh, 123 C.A. 365 (1932). The Evidence Code requires the lawyer to claim the privilege when asked to disclose the confidential information. The cases hold that the privilege continues when there was consultation and no employment, and where the employment was later terminated.

Canon 9 enjoins us to avoid even the appearance of impropriety. Even where a former client discloses the same information to others, the lawyer with whom he discussed the matter in confidence would appear to be taking advantage of that confidence when he assumes the cross-examiner's role.

If the attorney is able to represent one of the defendants within the Rules, strict compliance with the Rules is mandatory. At a minimum the informed written consent must be obtained from both the first prospective client (witness) and the second prospective client (defendant). Under the facts given, the attorney has not obtained the required consent from the former client (witness).

The Committee had occasion to point out in our Opinion No. 353 that informed consent is virtually impossible to obtain in some situations. Assuming that the attorney can present and explain the waiver or consent to the former client under these circumstances, we have serious reservations as to the efficacy of such consent. At any stage of the representation of the new client the

attorney may suddenly become aware of some fact relating to his former client's credibility, and would be duty bound to cross-examine. The problem of informing the first client is such that independent legal advice may be required.

An additional serious problem lies in the possibility that the lawyer could be called as a witness, once consent is given, by either side. Once the credibility of the first client is attacked, the prosecution could call the lawyer to rehabilitate the witness by showing a prior consistent statement (to the detriment of the defendant client). Or the lawyer may be called to impeach the witness (former client), thus creating an appearance of impropriety, in that he is attacking the credibility of one who came to him and related confidential matters. Withdrawal may then be appropriate.

The attorney refers us to U.S. vs. Garcia 57 F.2d 272 (5th Cir., 1975) and U.S. vs. Jeffers 520 F.2d 1256 (7th Cir., 1975). It is worth noting that these cases involve other laws than our Section 6068(e) of the Business and Professions Code and Rule 4-101, upon which we rely. We emphasize that our concern is with the ethical, not the legal, rule. These cases, however, illustrate the ethical dilemma faced by the attorney when a former client becomes a witness for the prosecution. Further, our perspective differs from that of an appellate court, which, viewing a completed trial, may consider, inter alia, the seriousness of the conflict, the extent of any prejudice to the defendant, and the impact of a re-trial upon the administration of justice.

The Court in Garcia proposed an elaborate waiver to be made by the defendant, but did not discuss the duty to the former client, which duty is central to this opinion.

It is the Committee's opinion that the representation of one of the remaining defendants would present a clear violation of the Rule. Nonetheless, the Committee believes that the following should be brought to the attention of the Bar: Often in the past, inquiries directed to us as an ethics committee illustrate that some conduct, while arguably not in violation of the Rules, may still be unethical. Therefore, where advice is sought by a lawyer as to future conduct, the Committee's advice proceeds from a consideration of the highest and best ethical standards for the legal profession. We see our duty to the profession as delineating those ethical standards as well as interpreting the Rules and Canons.

This opinion is advisory only. The Committee acts upon specific questions submitted ex parte and its opinion is based only on those facts set forth in the question submitted.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION No. 367
(05/18/77)



TRIAL COUNSEL AS WITNESS -- Neither a lawyer nor his firm should undertake representation of a client in connection with pending or contemplated litigation in which the lawyer ought to testify unless it is clear that the refusal of representation would work a substantial hardship on the client.

Rules Interpreted: 2-111(A)(4)(d)
DR 5-101(B)
DR 5-102(A)

A member of a law firm is a director, officer and principal stockholder of a corporation which has requested the law firm to represent it in connection with contemplated litigation. It is anticipated that the lawyer will testify on behalf of the corporation at trial, and that the testimony will relate to knowledge of the corporation or its activities obtained by the lawyer-witness in his capacity as a principal of the corporation as distinguished from that as a lawyer. The lawyer has requested the Committee's opinion with regard to the following questions:

1. May the law firm of which the lawyer-witness is a member represent the corporation of which the lawyer-witness is a principal shareholder, director and officer?

2. If not, would such representation be ethically appropriate if the lawyer-witness is on leave from the law firm at the time of commencement of the lawsuit through the trial?
3. If not, would the fact that the client would be required to incur substantially greater costs to obtain representation constitute a "substantial hardship" within the meaning of Rule 2-111(A)(4)(d) of the Rules of Professional Conduct?

It is the opinion of this Committee, as it has consistently been expressed in previous opinions, and it is an established ethical principle, that where a lawyer may be required to testify to substantive issues in behalf of a client, neither the lawyer nor any member of his firm should undertake in the first instance or continue without representation of the client in connection with the litigation in which the lawyer ought to testify, unless there are specific facts indicating that the refusal to represent the client would work a substantial hardship on the client. LA Opinion No. 312 (June 25, 1969); LA Informal Opinion 1970-13; DR 5-101(B); Rule 2-111(A)(4); DR 5-102(A); ABA Opinion 220.

The rationale which informs the rule is that a lawyer who is both counsel and witness undertakes potentially inconsistent roles,

thus opening the lawyer-witness to impeachment for interest, or leaving the counsel to argue his own credibility. Further, opposing counsel may suffer an unfair handicap in challenging the credibility of the lawyer-witness who also appears as an advocate. EC 5-9.

Even if the lawyer-witness is on leave from his law firm from commencement of the lawsuit through completion of trial, it is the opinion of this Committee that the lawyer's association with the law firm is not sufficiently attenuated to permit the law firm to represent the client in contemplated litigation. The lawyer's temporary leave from his firm for purposes of permitting it to conduct the litigation does not alleviate the problem giving rise to the rule. The lawyer on temporary leave would be only slightly less impeachable for interest; he would be faced with the prospect of having his credibility argued by a member of the firm with which he was recently associated, will shortly join again, and relied on for his livelihood; and he would still be faced with the inconsistent role of witness on the one hand and advocate, albeit once removed, on the other.

The foregoing principle would apply regardless of whether the client is an individual, a corporation, or a trust. It is the fact that the lawyer representing the client may be called upon to testify during the litigation which poses the ethical dilemma, not the status of the client.

An exception to this general principle is set forth in Rule 2-111 (A)(4)(d) of the Rules of Professional Conduct, and provides in pertinent part as follows:

"(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify under the following circumstances:

. . .

"(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The cost of obtaining alternative counsel and the termination of an attorney-client relationship of long duration is not generally considered sufficient to establish the requisite substantial hardship. Whether a refusal of the lawyer and his firm to represent the client would create a sufficient hardship on the client to permit such representation is a matter of fact to be determined in each particular case. Clearly, the personal or financial burden to the client which may result from the lawyer's refusal of representation should be considered. If the additional expense expected to be incurred by the client to obtain alternative representation would substantially affect the client's financial integrity, then such expense is clearly a material consideration and may under certain circumstances be determinative. In this regard, ABA Code of Professional Responsibility EC 5-10 states in part:

"In the exceptional situation where it would be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues employment."

Unless there are facts clearly indicating that the lawyer's services are uniquely valuable with respect to particular litigation and that refusal to accept employment by the lawyer or his firm would work a substantial and unreasonable hardship on the client, the lawyer should refuse to accept employment or should withdraw. Doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate. LA Informal Opinion 1970-13. This is particularly important at the outset of the litigation where a decision not to undertake representation of a client in a matter in which the attorney ought to be called as a witness would preclude the possibility of having to litigate the question, with the attendant consumption of time and expense, at a later stage of the proceedings. However, if it is determined that because of a substantial hardship on the client, the law firm should accept the employment, the lawyer-witness should not participate in the preparation or conduct of this litigation except in his capacity as a witness.

This opinion is advisory only. The Committee acts on specified questions submitted ex parte and its opinion is based on only those facts as are set forth in the question.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION No. 368
(06/16/77)

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ATTORNEY AND CLIENT MEDICAL LIENS - DISBURSEMENT
OF CLIENT'S FUNDS -- An attorney who has notice
of a physician's lien on funds recovered by a
client in a personal injury action should not
disburse funds to the physician without the cli-
ent's consent. If the client refuses to give his
consent, the attorney should notify his client
and the physician that he will hold the funds until
the dispute between them is settled.

Rules Interpreted:

5-104(A) (1)
8-101(B)

The Committee has been asked for an opinion concerning the following facts: An attorney undertakes to represent client X in a personal injury action. In the course of his representation, he signs a medical lien concerning X's medical bills. The attorney receives medical reports and a bill from the physician.

When a settlement is made, the insurance carrier remits a check to the attorney. The attorney informs X that he intends to honor the lien but X objects and demands that the funds be remitted to him and he will settle with the doctor. What are the attorney's ethical responsibilities?

The general rule concerning money which is received or held for the benefit of a client is stated in Rule 8-101 of the Rules of Professional Conduct. Rule 8-101(B)(4) states that a member of the Bar shall:

"Promptly pay or deliver to the client as requested by the client the funds, securities or other properties in the possession of the member of the State Bar which the client is entitled to receive."

In the fact situation which has been posed, the client is demanding funds which are in the attorney's possession. However, the attorney has notice of a lien on those funds and in addition, since he has received a medical report from the physician holding the lien, the attorney has independent evidence that a sum is or may be owing to the physician. Whether the client is "entitled to receive" the funds is a question of law which we do not decide. Since the client is not necessarily "entitled" to the full sum in his account, Rule 8-101(B)(4) does not require the attorney to pay the full amount to the client upon his request. The attorney must, however, release those funds not in dispute to which the client is entitled.

The attorney may not, however, pay a physician's bill out of a client's money without the client's consent. Rule 5-104(A)(1) states that an attorney may pay expenses incurred by the client to third persons out of funds collected, but only with the consent of the client. When the client does not consent to such payment, the attorney should not disburse funds. Opinion 357; ABA Formal Opinion 162.

Whenever an attorney has notice of a lien upon funds which he has received for the benefit of a client, and the client objects to his honoring the lien, the attorney's duty is to notify both the holder of the lien and his client that he will hold the funds until the dispute between them is settled. The attorney should, however, use means consistent with his obligations to his client to encourage a reasonably prompt resolution of the dispute in order to avoid the necessity of bringing an action of interpleader. These means might include suggesting that the parties enter into settlement discussions, submit to arbitration, or contact the "hotline" recently established by the Los Angeles County Bar and Medical Associations. By doing so, the attorney fulfills his ethical responsibilities and avoids becoming personally liable to the lienholder for amounts owed to him by the client.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on only those facts as are set forth in the question submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 369
(November 23, 1977)

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DUTY NOT TO COMMUNICATE WITH OTHER
PARTY - EMPLOYEES OF CORPORATION: An
attorney may communicate with an execu-
tive and an officer who have both left
the employment of a corporation which is
an adverse party, but may not communicate
with certain executive employees of a
corporation without the consent of
opposing counsel.

Rules Interpreted:

Rule 7-103
DR 7-104

During a recently tried case the inquiring attorney was associated with plaintiffs' counsel as an expert legal consultant. In such capacity, he consulted with plaintiffs' counsel throughout the proceedings, and provided expert assistance, including reviewing and helping prepare legal documents. The attorney also helped plaintiffs secure and prepare witnesses. The case is now on appeal. The attorney is no longer associated with plaintiffs or their counsel in any way.

The attorney desires to write a book concerning the case, and in connection therewith to interview certain persons who are not themselves parties to the action. "A" is a former chief officer of the defendant corporation who has recently left the company's employment. "B" is a former middle-level executive who has also left the company. "C" is currently a middle-level vice president of the company with responsibility in certain defined areas, but with no authority to negotiate or reach a settlement on behalf of the company.

The inquiring attorney requests an opinion as to whether he may interview individuals "A," "B" and "C," provided that he fully discloses his previous relationship and engages in no other deceptive practices.

While this opinion does not specifically address certain related ethical problems, the Committee nevertheless wishes to call them to the attention of the inquiring attorney for his consideration. First, if publication will occur prior to the final judgment, the attorney should consult Rule 7-108(B) which prohibits communications to the court with respect to a pending matter made in the absence of opposing counsel. The circumstances under which a publication may be improper under Rule 7-108(B) are discussed in this Committee's Opinion No. 343 (January 24, 1974). For example, if the proposed book contains matters relevant to the appeal which are not discussed in plaintiffs' brief, it

must not be published at a time when the case is under submission by the court and when no further written or oral argument is permitted. A publication at such time would constitute, in practical effect, a communication to the court made in the absence of opposing counsel.

The lawyer-author should also be cautioned against the disclosure of confidences obtained from his own clients without their express consent and approval. See Business and Professions Code, Section 6068(e). Finally, if the book is intended primarily for persons other than members of the bar, the attorney is referred to this Committee's Opinion No. 287 (February 4, 1965) which discusses the prohibitions against solicitation found in Rule 2-102 as they apply to publications by lawyers. However, the rules governing advertising are in such a state of flux that we express no opinion on that question.

The specific inquiry directed to the Committee is governed primarily by Rule 7-103 which provides that a member of the State Bar "shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without express consent of such counsel."

1. Is the attorney governed by Rule 7-103 since he is no longer acting as an attorney in the case?

The inquiring attorney apparently agrees that,

even though he was employed only as a "legal consultant" to plaintiffs' counsel, he would be governed by the rule if he were still employed in such capacity. This follows because the attorney was extensively involved in the trial and, among other things, assisted in reviewing and preparing legal documents and in preparing witnesses. The Committee does not believe that Rule 7-103 can be circumvented simply by an attorney disassociating himself with the case. There exist numerous situations in which an attorney who is no longer representing a party must nevertheless continue to abide by otherwise applicable rules of ethics because of his past representation. The Committee recognizes that DR 7-104, the comparable rule under the ABA Code of Professional Responsibility, is prefaced by the phrase "During the course of his representation of a client." Absent contrary authority, the Committee must presume, however, that the omission of these words from Rule 7-103 was intentional.*

* The intentional omission of these words may be inferred from the construction of Rule 7-106, which prohibits certain communications by an attorney with jurors. Rule 7-106 is divided into subparts "A" and "B" which discuss such communications "before the trial of a case" and "during the trial of a case," respectively. This and other rules indicate that the draftsmen were concerned with the applicability of various rules at various time periods or stages of a proceeding.

2. Does Rule 7-103 preclude interviews with individuals "A," "B" and "C"?

The status of individuals "A," "B" and "C" as present and former managing employees of the defendant corporation could prohibit the proposed interviews. Rule 7-103 and DR 7-104 prohibit an attorney from communicating with an opposing party without the consent of counsel. The Committee finds nothing unethical in an attorney interviewing a non-management employee of an adverse party who may be a witness without the consent of that party's attorney.

The question to be resolved by the Committee, therefore, is how far the protection afforded to a corporate party by Rule 7-103 should be extended. In Drinker on Legal Ethics (1953), page 201, it is stated that Canon 9, the predecessor of DR 7-104, "probably precludes interviews with managing employees of a corporation having authority to bind it." Drinker does not state, however, whether the rule also extends to other managing employees. As stated in Los Angeles County Bar Formal Opinion No. 234 (1956), "[t]he question of how far this protection [of a corporate party] should be extended is a difficult one, but in the case presented the agent and the underwriter do not appear to the Committee to be so closely identified with management of the insurance company as to be shielded by its status as a party

to be represented by counsel." The Committee believes that the relevant test is the extent to which the employees are "closely identified with management of the company."

A. Proposed Interview of Individual "C".

Unlike "A" and "B," individual "C" is still employed by the company as a vice president. The Committee cannot ascertain from the facts provided by the inquiring attorney whether individual "C" is so closely identified with the management of the defendant corporation as to be within the concept of a "party" for the purposes of Rule 7-103.

The position of individual "C" as a vice president is itself not a sufficient indicator of his identification with the management of the corporation to prohibit the proposed interview. Titles such as "Vice President" may represent significantly different positions of responsibility depending on the size and business of the corporation. The Committee believes that the following factors, which seek to identify an employee's authority to act on behalf of the corporation, are more relevant to the determination of whether individual "C" is too closely identified with the management of the corporation to permit the proposed interview:

1. If individual "C" had the authority, which he

apparently does not, to negotiate a settlement on behalf of the corporation or otherwise control corporate decisions with respect to the litigation, Rule 7-103 would prohibit the proposed interview. See American Bar Association Informal Opinion No. 1377 (1977).

2. The interview may also be improper if the duties of individual "C" and his position in the corporate management structure are such that an admission by him concerning the subject of the proposed interview would be binding on the corporation. In this regard, the inquiring attorney may wish to consult California Evidence Code, Section 1222, which states the "vicarious admissions" exception to the hearsay rule, and Crawford v. County of Sacramento, 239 Cal. App. 2d 791, 800 (1966). Under the Federal Rules of Evidence, 801, any agent or employee of a corporation may bind his employer with respect to a matter within the scope of his duties. Under certain circumstances, therefore, it may be unethical to interview an employee who has very limited authority, if such employee's admission could bind his corporate employer on a matter of controversy in the litigation.

3. A final factor is whether individual "C" in the course of his employment has access to confidential corporate information relevant to the subject of the proposed interview. If "C" has access to confidential information he probably occupies such a position of trust with the corporation

as to make the proposed interview improper unless consent from the corporation's counsel is obtained.

If after considering the factors discussed above, it is determined that individual "C" is closely identified with the management of the defendant corporation, the inquiring attorney may not conduct the proposed interview without prior consent of the corporation's counsel. In the case of such an employee (who for convenience will be referred to herein as a "controlling employee"), the right of the corporation to representation by counsel must prevail over the inquiring attorney's unrestricted access to officers and employees of the corporation. See American Bar Association Informal Opinion No. 1377 (1977).

It does not seem material that the purpose of the proposed interview of individual "C" is not intended to influence the outcome of the case. The intent of Rule 7-103 is not only to prevent negotiations or compromises with a party without consent of counsel, but to prohibit any communications whatsoever upon the subject of controversy. In discussing former Canon 9, ABA Opinion 187 (1938) states that such Canon "is to be construed literally and does not allow communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts." Similarly, in Drinker On Legal Ethics (1953), page 202, it is stated: "The Canon is not restricted to interviews to effect a compromise, but applies

to all cases." The Committee is of the opinion, therefore, that the purpose or subject of the proposed interview is not critical to determining whether the interview is permissible under Rule 7-103.

B. Proposed Interview of Individuals "A" and "B".

Unlike "C," individuals "A" and "B" are no longer employees of the company. The inquiring attorney has advised the Committee that individual "A," a former "chief officer" of the defendant corporation, has "just left the company's employment." Individual "B," a former "middle-level executive," has also left the company. The Committee will assume that individuals "A" and "B" had sufficient responsibilities while serving in such capacities to bring them within the concept of a "party" for the purposes of Rule 7-103. The issue presented, therefore, is whether the prohibitions of the rule should be extended to encompass former "controlling" employees. The Committee recognizes that certain ethical dangers may be posed if the rule is not extended. For example, as employees of the company "A" and "B" may have received, or had access to, confidential information regarding the company, and probably still have a fiduciary duty to the company not to disclose such confidential information. The rule which prohibits direct communications with an adverse party represented by counsel

might be easily evaded if it were held to be inapplicable in this situation.

The Committee has found no authority, however, which supports the extension of Rule 7-103 to include former employees. Moreover, application of the rule as extended would be difficult without guidelines as to how long a "controlling" employee would be shielded by the rule after his or her resignation. The Committee is of the opinion, therefore, that the inquiring attorney may interview individuals "A" and "B" without the consent of opposing counsel.

C. Conclusion.

To summarize, since the attorney was extensively involved in the preparation of plaintiff's case for trial, his conduct is governed by Rule 7-103 even though he is no longer associated with the case. The attorney may not communicate, therefore, with present "controlling" employees without the consent of opposing counsel. He may communicate, however, with former employees without the consent of counsel for the opposing party.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as set forth in the questions submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 370
(01/17/78)

FEES - UNPAID - INTEREST - It is not improper for an attorney, with the prior agreement of the client, to impose a reasonable interest charge on delinquent statements of fees and costs.

Rules Interpreted:

2-107

The Committee has been asked whether it is proper for an attorney to impose an interest charge on delinquent statements of fees and costs. A prior opinion of this Committee (Informal Opinion No. 1972-4) addressed the same question and concluded that it is improper for an attorney to add a service charge on regular monthly bills, if bills are not paid within a given time. That opinion cited ABA Opinion 151 (improper for an attorney to offer a discount on bills paid within a stipulated time), and ABA Informal Opinion 741 (improper to state on bill that interest at the rate of 6% per annum will be charged on accounts not paid within thirty days). The opinion also stated:

The practice of law is a profession wherein the relationship between an attorney and his client should remain highly personal. Anything which smacks of commercialism would appear to place an undue emphasis upon the mere getting of money and would tend to alter the attorney-client relationship into an impersonal and commercial one and cannot be condoned.

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In the five years which have elapsed since this Committee wrote Opinion 1972-4, the legal profession has adopted various business techniques including computerized billing and the use of credit cards for payment. These developments have been noted and approved by the Board of Governors of the California State Bar (Resolution of February 8, 1975 approving the use of credit cards) and by other Ethics Committees (ABA Committee on Ethics and Professional Responsibility; Formal Opinion 338). The ABA Opinion specifically condones the imposition of a reasonable interest charge on delinquent accounts conditioned on the client's prior agreement.

This Committee, therefore, reverses the decision in Informal Opinion 1972-4. The Committee finds that it is not unethical per se for an attorney, with the prior agreement of his client, to impose a reasonable charge on delinquent accounts, but declines to express an opinion as to whether a given rate of interest is or is not reasonable. However, the Committee does suggest that if an attorney wishes to impose an interest charge, the following guidelines should be followed:

1. Billing practices should be discussed with the client before the attorney is retained and the client's consent to the interest charge should be obtained.
2. The rate of interest must not be unreasonable (Rule 2-107; EC 2-17, Code of Professional Responsibility).

All legal restrictions governing such charges must, of course, be observed; these are questions of law, however, on which we express no opinion.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 371

(October 11, 1977)

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ATTORNEY-CLIENT; FEES--UNPAID; SUBSTITUTION OR WITHDRAWAL; PRIOR CONSENT:

It is improper for an attorney to require, at the outset of employment, that a client execute a Substitution of Attorney to be subsequently utilized by the attorney if the client fails to timely pay for services rendered and costs incurred.

Rules Interpreted:

Rule 2-111

DR 2-110

The Committee has been asked whether, as a means of avoiding the delay and the performance of additional services without likelihood of compensation which may result when an attorney's fees and costs are not paid and the attorney must seek to withdraw, the attorney may include in his retainer agreement the following language:

"Client acknowledges that attorney has agreed to accept representation in these proceedings based upon client's promise to pay for services rendered and reimburse for costs advanced as is more particularly set forth below. Simultaneous with the execution of this retainer agreement, client is signing an undated substitution of attorneys. Client and attorney agree that in the event client fails to pay for services rendered and reimburse for costs advanced as agreed herein, that attorney

shall have the irrevocable authority to date, file, and serve said substitution of attorneys, placing client in propria persona, subject to the following conditions:

(A) Before doing so, attorney shall give client not less than thirty (30) days written notice to client's last known address advising client specifically of his breach of this retainer agreement, allowing a thirty (30) day period during which client may cure said breach and/or obtain other counsel, and advising client that in the event of his failure to do either, that said substitution of attorneys will be dated, filed and served.

(B) In so filing and serving said substitution of attorneys, attorney shall insert therein the last known address for client; and,

(C) A copy of said substitution of attorneys shall be mailed to client at the time of filing and service thereof, directed to his last known address."

The Committee assumes that, were such language included, it would be the attorney's intention to act in accordance therewith in the event the client fails to pay for costs and reimburse for expenses. It therefore responds, as requested by the inquiring attorney, with respect to both the proposed language set forth above and with respect to the course of action permitted thereby (together the "proposed concept.")

The Committee believes the proposed concept is not in accordance with the spirit and intention of Rule 2-111, California Rules of Professional Conduct, the relevant portions of which are quoted below.

"Rule 2-111 Withdrawal from Employment

(A) In general

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a member of the State Bar shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

* * *

(C) Permissive Withdrawal

If Rule 2-111(B) is not applicable, a member of the State Bar may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters, unless such request or withdrawal is because:

(1) His client:

* * *

(f) Deliberately disregards an agreement or obligation to the member of the State Bar as to expenses or fees.

* * *

(5) His client knowingly and freely assents to termination of his employment."

ABA Disciplinary Rule 2-110 is to the same effect.

Rule 2-111, in total, states the proposition that an attorney shall not withdraw from employment unless (a) a tribunal's permission, if required, is obtained; (b) reasonable steps to avoid foreseeable prejudice to the client are taken; and (c) one of the specifically enumerated grounds for withdrawal is present. Behind the language of Rule 2-111 lies the concept, articulated in former ABA Canon 44, that once having accepted employment an attorney is not free to withdraw absent "good cause" for doing so.¹

The proposed concept, coupled with tenor of the inquiry, which indicates the inquiring attorney engages in "a substantial amount of commercial litigation," implies that the proposal is intended for use primarily if not exclusively in litigated matters. This Committee does not pass on the question whether a tribunal's permission for a specific withdrawal or substitution would be required except to note that, in those instances where approval would be required, the use of a pre-signed Substitution of Attorney may effectively preclude inquiry by the Court as to the circumstances behind the withdrawal.²

¹Former ABA Canon 44 provides in relevant part:

"The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause."

²Unlike the equivalent form in use in the United States District Court, Central District of California, which requires Court approval, the Substitution of Attorney form in use in the Los Angeles County Superior Court does not require Court approval and is effective upon filing and service.

Similarly, although the concept proposed does not necessarily preclude the taking of reasonable steps to avoid foreseeable prejudice to the client, the existence of the pre-signed Substitution of Attorney creates a substantial risk that it will be utilized without the balancing of the client's and attorney's interests which would occur if the client were requested to sign the Substitution of Attorney at the time the attorney's desire to withdraw arose or if a Court were requested to rule upon a Motion to Withdraw. Indeed, the concept proposed appears to have arisen out of the inquiring attorney's past experience wherein he finds he is "often compelled to render services and expend substantial amounts of time on behalf of the client with little or no hope of compensation." While such a circumstance is unfortunate, Rule 2-111 (A)(2) requires that the attorney take "reasonable steps to avoid foreseeable prejudice to his client" and to comply with the further requirements of the rule.

Closely related to the point just discussed is the language of Rule 2-111(C)(1)(f). That provision permits withdrawal if the client "deliberately disregards an agreement or obligation . . . as to expenses or fees." There is no similar provision permitting withdrawal where the client merely fails to make such payments. Whereas a willful refusal to pay fees or expenses gives rise to a right of withdrawal, failure to pay due to inability does not. See, e.g., Opinion No. 356 and authorities cited therein. The

proposed concept minimizes if not eliminates the likelihood that the reason for the non-payment will be investigated either by the attorney or tribunal. As stated in Opinion No. 251:

"In some instances the non-payment of reasonable fees . . . is deemed to be adequate reason for withdrawal . . . In each instance, however, it must depend upon the attitude and the circumstances of the client. For example, financial inability to pay is not generally considered adequate at least where natural persons are concerned."

Finally, it is our opinion that Rule 2-111(C)(5) does not authorize the proposed concept since if it did so, the language and spirit of the remainder of Rule 2-111 would be negated. It is our opinion that the knowing and free assent required by Rule 2-111(C)(5) cannot be effectively given in advance since the circumstances existing at the time of the proposed withdrawal and the consequence of the withdrawal cannot be adequately predicted by the client or the attorney at the time the attorney is initially retained.

In summary, it is our opinion that Rule 2-111 places on the attorney desiring to withdraw a burden to discuss the reasons and consequences with the client and if assent is not then obtained, to establish the existence of one of the enumerated grounds for withdrawal, obtain, where required, the approval of the relevant tribunal, and in all instances seek to avoid foreseeable prejudice to the client.³ The proposed

³See, e.g. ABA formal Opinion 90 (December 3, 1932.)

concept creates an unacceptable risk that some or all of the components of that burden will be eliminated.⁴

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the questions submitted.

⁴The Committee has considered its prior Opinions Nos. 32, 125 and 211 and considers them factually distinguished. Nothing in this opinion disapproves the conclusions therein stated.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 372
(February 21, 1978)

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ADVERTISING, FEES-SHARING, LAY INTERMEDIARIES UNAUTHORIZED PRACTICE-AIDING SHARING OF FEES -- It is unethical for an attorney to be a shareholder, director, and officer of a corporation offering financial planning if the services to be rendered would constitute the practice of law.

Rules Interpreted:

2-103 (E)
3-101 (A)
3-102
3-103

The Committee's opinion has been requested regarding the ethical propriety of an attorney participating in, and owning an interest in, a financial management consulting firm while maintaining a separate and distinct law practice in the following circumstances:

A corporation is formed by four persons, a lawyer in private practice, a certified public accountant, and two professional financial management consultants. All four are stockholders, directors and officers of the corporation and as such share in the profits of the business. The corporation would offer its clients, among other things, personal financial analysis and estate planning, assistance in obtaining credit, analysis and design of forms of doing business including employee benefits and compensation, and accounting services including preparation of tax returns and financial statements.

No legal documentation would be prepared by the corporation.

The duties of the attorney officer and director would be to assist the corporation in designing plans for clients, utilizing the attorneys' knowledge of corporate, business, estate planning, tax and pension law. The corporation would charge each client an initial fee for plan design and a monthly fee for plan supervision and coordination. The amount of the fee would depend upon the complexity of the plan, the projected savings to the client and the extent of review required.

It is not unethical per se for a lawyer to participate in another business or engage in another occupation if the lawyer complies with the provisions of Rule 2-103(E). (See L.A. Opinion No. 331 and opinions cited therein and also L.A. Opinions Nos. 340, 349, and 351.)

Rule 3-101(A) provides that a member of the State Bar shall not aid any person, association, or corporation in the unauthorized practice of law. Rule 3-102 provides (with certain exceptions not applicable to this inquiry) that a member of the State Bar shall not directly or indirectly share legal fees except with a person licensed to practice law. Rule 3-103 provides that a member of the State Bar shall not form a partnership with a person not licensed to practice law if any of the activities of the partnership consist of the practice of law. Presumably this prohibition would also apply to business arrangements other than partnerships.

In Opinion No. 335 this Committee determined that it was improper for a lawyer and a doctor to form a corporation or a partnership for the purpose of aiding other attorneys in the prosecution of malpractice litigation when the corporation's services would be provided jointly by the doctor and the lawyer and it was assumed that the lawyer's services constituted the practice of law.

If the activities of the corporation described in the present inquiry constitute the practice of law, then the attorney's participation is unethical even if the attorney's law practice is kept separate, no legal business is fed to him and his status as a lawyer is not advertised by the organization. (See generally L.A. Opinions Nos. 327 and 262, L.A. Informal Opinion 1969-4.)

What constitutes the practice of law is a legal question outside the jurisdiction of this Committee. It should be noted, however, that the practice of law clearly includes the formulation of advice on legal matters and is not confined to the drafting of documents.

The Committee has held that it is improper and unethical for an attorney to render a legal opinion to a lay consulting firm for the purposes of transmitting the opinion to its customer as an attorney's opinion and for the attorney to bill the lay consulting firm which in turn bills its customer for a larger fee to include its share of the services rendered (L.A. Opinion No. 194.)

(See also, L.A. Opinions Nos. 69 and 270.) The same opinion also held that it was improper for an attorney to handle legal problems for a client through a lay consulting firm and bill the lay consulting firm for his services rendered, which firm in turn bills the client for a larger fee to include its share of the services rendered.

In California State Bar Ethics Opinion 1969-18 the Committee considered the propriety of the proposed association of an attorney with a firm of aviation consultants, consisting of civil engineers and others, which offered consultation services to owners and prospective owners of public airports and prepared plans for the location and construction of said airports. The lawyer's participation in the firm would have included giving advice on laws, rules and regulations of Federal and State agencies. One of the purposes of the firm and the lawyer's participation was to produce a complete product which would satisfy the client's needs. The Committee determined that the arrangement was improper because, among other things, it appeared to involve the lawyer in aiding the unauthorized practice of law and the division of fees with those not authorized to practice law. (See also L.A. Opinions 327 and 359 dealing with attorneys employed by corporations providing services to other attorneys.)

While this Committee does not decide what constitutes the practice of law, it appears that the activities of the attorney in the present inquiry may be similar to those found to be objectionable in State Bar Opinion 1969-18. Among the many factors to be considered in any such determination are whether the attorney

is involved in the planning for individual clients of the corporation and whether those clients have independent counsel.

This Opinion is advisory only. This Committee acts upon specific questions submitted ex parte and its opinion is based only on such facts as are set forth by the inquiring attorney.

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LOS ANGELES COUNTY BAR ASSOCIATION LOYOLA UNIVERSITY

ETHICS COMMITTEE

OPINION NO. 373

COLLECTION OF CLAIMS; COLLECTION AGENCIES-FEES-UNPAID

It is improper for an attorney in collecting claims against a former client to use a collection agency which, through its association with a credit service, has the ability to impair a debtor's credit until the debt is paid. Use of such an agency on behalf of the client is proper if the agency's methods are lawful.
Rules Interpreted: EC 2-23

This Committee has been asked for its opinion whether an attorney may ethically use a collection service which operates in the manner described below to collect unpaid fees due the attorney as well as amounts due the attorney's clients. The collection service, in addition to sending a series of collection letters to the debtor, is a subsidiary of a credit service which advises subscribers whether or not to extend credit to or accept checks from persons with whom they deal. Because of this relationship, the collection service, through the credit service, is able to curtail the debtor's banking and check cashing privileges until the obligation has been satisfied.

The Committee is of the opinion that the use by an attorney of a collection agency using these particular methods of collection is ethically improper.

The damaging of a former client's credit and ability to cash checks is inconsistent with the attorney's duty to avoid

controversies over fees and to attempt to resolve amicably any differences with respect to fees (EC 2-23). This Committee has held that an attorney may not ethically enforce a lien or collect from a client's funds held in his trust account the amount of the attorney's fee without either the consent of the client or the establishment of his right to said fee by legal action. (Informal Opinions 1970-1 and 1971-4). The Committee is of the opinion that use of techniques such as the restriction or damaging of a former client's credit is subject to the same objections as the summary enforcement of a lien; it does not afford the client sufficient protection and inhibits his ability to raise valid defenses to the attorney's claim for fees.

The Committee is of the opinion that the attorney may properly recommend to, or use for the benefit of, his client any collection agency which the attorney reasonably believes uses lawful methods of collection.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the questions submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 374

(APRIL 28, 1978)

CONFIDENTIAL INFORMATION: USE OF COMPUTERIZED BILLING SERVICE, FEES: INTEREST. It is ethically proper for an attorney to use an outside computerized billing service in billing clients so long as care is taken in selection of the service and to avoid the disclosure of confidential information. Reasonable interest may be charged on client's delinquent accounts with the prior consent of the client, L.A. Opinion 370. Rules Interpreted: Bus. & Prof. Code §6068(e); ABA Code Canon 4, EC 4-3

The Committee has been asked the following questions:

1. May an attorney ethically use an outside computerized billing service company in billing his clients.
2. If so, may a finance charge automatically be added to a client's bill when the client's account is overdue for a certain period of time in cases (a) where there is no prior consent from the client to such a charge or (b) where the attorney and client have agreed to such a finance charge in the initial retainer agreement.

With respect to the first question, the Committee is of the opinion that it is ethically proper for an attorney to use an outside computerized billing service in billing his clients so long as certain conditions are observed.

Business and Professions Code §6068(e) provides that it is the duty of an attorney "to maintain inviolate the confidence,

and at every peril to himself to preserve the secrets of his client."

In order to perform legal services, a lawyer requires the services of non-lawyer employees. There are necessary disclosures of confidential information to these employees. Such disclosures may consist of dictation of memoranda and correspondence requiring the services of a secretary, filing by a secretary or clerk of copies of letters and memoranda containing confidential communications of the client and entries in books and records by a bookkeeper which are taken from the attorney's notes and records which may contain confidential information. Disclosures such as these to a lawyer's employees who have been instructed to keep clients' matters confidential, are reasonably necessary for the accomplishment of the purposes for which the lawyer was consulted. The client's consent, express or implied, to such disclosures evidences no intent by the client to abandon the confidentiality of his communications to his lawyer. If a law firm installs data processing equipment in its office, disclosure of confidential information to the clerk operating that equipment is governed by the same principles as disclosure to a secretary, filing clerk, or bookkeeper. Should a different result follow if the firm instead employs an independent contractor to program and process data given to it by the firm?

In the absence of special circumstances, the furnishing by a law firm to a central data processor of the firm's bookkeeping,

billing, accounting and statistical data, which contain names, addresses, and the nature of the clients' matters does not involve Section 6068(e) since such information usually constitutes neither a confidential communication nor a secret. However, detailed time records describing the services performed are likely to contain information which is confidential. May such confidential information be revealed to an independent data processor without violating Section 6068(e)? In an opinion subsequently withdrawn, the California State Bar Ethics Committee held that the disclosure, without the client's consent, of a client's secrets and confidences to a central data processor would violate the client's right to have his confidences and secrets preserved and would violate Section 6068(e). See Cal. State Bar Formal Opinion No. 1971-25, 46 State Bar Journal 692. This Committee holds otherwise and concludes that such disclosures are the same as disclosures to non-lawyer office employees.

ABA Informal Opinion 1002, interpreting former Canon 37, holds that disclosures to a central data processor as to the nature and extent of services rendered clients for the purpose of billing is not professionally improper unless such disclosures include matters communicated to the attorney in confidence.

EC 4-3 provides that

"Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential."

In ABA Informal Opinion 1127 the question presented was whether it was proper for attorneys to use a central facility for the storage of files in a computer memory, the material to be available to no one other than the facility's employees and the particular attorney who owns the governing file. The Opinion noted that there is some risk of a failure to preserve the client's confidence whether the disclosures are made to an employee in the lawyer's office or to an outside data processor. The Committee determined that under former Canon 37, so long as arrangements are made so that the information transmitted to the data processor shall be kept in confidence, and the employees of the law firm and the data processor do keep them in confidence and do not permit disclosure to any unauthorized person, then there is no violation of the Canons of Ethics. The Committee cautioned that the same burden of secrecy exists in the case of all employees of the data processor in respect to all information given the data processor as exists for employees of the law firm and information held strictly in the law firm's files.

The ABA Committee's analysis as it pertains to the ABA Code of Professional Responsibility is based on Canon 4 which provides

that "A Lawyer Should Preserve the Confidence and Secrets of a Client." The Committee pointed out that ethical considerations under former Canon 37 and the new Canon 4 are similar and that lawyers should be diligent in their efforts to prevent misuse of information by their employees. Citing EC 4-3, quoted above, the Committee stated that the tests under Canon 4 are the appropriate selection of the agency, the appropriate rules within the agency for the preservation of secrecy, the appropriate warning to the agency, and the ability of that agency to keep the matters secret. If the agency meets such tests, the Committee held, it is proper for the lawyer to give limited information to that outside agency.

The Committee is of the opinion that furnishing information to a central data processor necessary to maintain statistical, time, and billing records is ethical, so long as the conditions outlined in EC 4-3 and ABA Informal Opinion 1127 are observed. It should be noted however, that special circumstances may exist where the name of the client or nature of the services performed may be so sensitive that ethically this information should not be disclosed to an outside agency, and in some instances not even to other employees of the lawyer. In such instances this information should either be coded or not disclosed to an outside data processor at all. It is the duty of the attorney to determine that such special circumstances do not exist, inasmuch as there is a presumption that all communications to a lawyer are confidential.

With respect to the second question, the Committee is of the opinion that a finance charge applied to delinquent accounts is not unethical per se. The ethical considerations involved in the imposition of such a finance charge are discussed in Opinion 370 recently adopted by this Committee. In that opinion this Committee held that reasonable interest could be charged on delinquent accounts so long as the client was informed, in advance, of the attorney's intention to do so and agreed to such charge. Reference is made to that opinion for a detailed discussion of the applicable ethical principles.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the questions submitted.

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ETHICS COMMITTEEFORMAL OPINION NO. 375
(June 22, 1978)LAW LIBRARY
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ADVERSE PARTY - COMMUNICATION OR NEGOTIATION
WITH: A member of the State Bar need not attempt to prevent an effort by his client to reach a compromise settlement by direct communication with the adverse party, subject to certain limitations. Opinion 365 overruled.

Rule interpreted: Rule 7-103, California
Rules of Professional
Conduct

The Committee's opinion has been requested, based upon the following statement:

"In an attempt to resolve by way of settlement a lawsuit involving certain rights in a patent, the defendant concluded that plaintiff's attorney may be deliberately interfering with the possible resolution of the dispute. The defendant has proposed to discuss settlement directly with the plaintiff. Defendant's attorney has made known to plaintiff's attorney the desire and intention of the defendant to discuss settlement directly with the plaintiff. Defendant is willing to conduct such conversation whether with plaintiff's attorney present or not, as plaintiff may prefer, except that if plaintiff's attorney is present defendant will also wish to have his attorney present. Plaintiff's attorney has responded by threatening to sue defendant and defendant's attorney for interference with contractual relationships if defendant communicates directly with plaintiff."

The inquiring attorney asks:

"Is there any violation of the canons of ethics or rules of professional conduct (or any other proscription) that would preclude the defendant from communicating directly with the plaintiff with regard to settlement of the litigation between them."

Since the Committee does not pass upon questions of law (L.A. County Formal Opinion 275), it expresses no opinion on whether the contemplated communications would constitute a violation of applicable law.

With regard to whether the contemplated communications would be ethically improper, Rule 7-103 of the California Rules of Professional Conduct provides, in pertinent part:

"A member of the state bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of said counsel."

In the instant case, while the inquiry does not contemplate that the attorney for the defendant will directly communicate with the plaintiff without the counsel of the plaintiff's counsel, it does contemplate that the defendant himself will do so and that he will do so with the knowledge of his lawyer. Is this an indirect communication prohibited by Rule 7-103? The Committee believes that, under the facts given, it is not. If the attorney had initiated the conference or indirectly participated in the negotiations through instructions to his client, his activities would be improper. The inquiry does not indicate that such activities are contemplated.

Rule 7-103, former Canon 9 of the Canons of Ethics of the American Bar Association, and former Rule 12 of the California Rules of Professional Conduct have been interpreted

as imposing upon the lawyer not only the duty to himself refrain from communicating with the adverse party but also to restrain his client from doing so. See, e.g., ABA Formal Opinion 75 and ABA Informal Opinions 663 and 524; L.A. County Opinion 365; and L.A. Informal Opinion 1966-16. An interpretation of Rule 7-103 which requires an attorney to restrain his client from negotiating a settlement directly places the attorney in the position of advising the client not to do something which may be in the client's best interests, creates a duty which the attorney has no adequate means to fulfill; and encourages sophisticated clients to conceal such intended contacts from their attorneys and, consequently, from opposing counsel. The Committee is of the opinion that such a requirement is undesirable and unnecessary. So long as the attorney is not, through his client, communicating indirectly with the adverse party, he is under no obligation to prevent his client from undertaking direct negotiations.

To the extent that L.A. Opinion 365 and L.A. Informal Opinion 1966-16 are inconsistent with this opinion, they are overruled.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and the opinion is based on such facts only as are set forth in the questions submitted.

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ETHICS COMMITTEE

OPINION NO. 376

(June 22, 1978)

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COMMUNICATION WITH ADVERSE PARTY BY
DEFENDANT'S CARRIER'S INVESTIGATOR
WITHOUT ATTORNEY'S KNOWLEDGE -- USE
OF INFORMATION OBTAINED BY INVESTIGATOR
FROM ADVERSE PARTY IN PRE-TRIAL AND
TRIAL PROCEEDINGS: It is proper for
an attorney to make use of information
obtained from adverse party without
his counsel's consent when attorney
was not aware that any such communi-
cation was made by his client's
insurance company's investigator
and he did not directly or indirectly
initiate the communication.

AUTHORITIES CITED:
Rule 7-103 and
Former Rule 12
ABA Code DR 7-104(A) (1)

An attorney has submitted the following fact
situation to the Committee:

In a personal injury action,
defendants A and B are each represented
by separate counsel. A's counsel
contacts B's counsel and requests
that he be allowed to take a statement
from B. B's counsel refused unless
he could be present and paid for his
attendance. Without the prior know-
ledge or consent of counsel for
either A or B, the insurance carrier

for A proceeded to make arrangements through its own independent investigators to obtain a signed statement from B.

As soon as A's counsel became aware of the preparations that were being made to take a statement from B, he attempted to cancel the taking of such statement. A's counsel was unsuccessful in contacting the investigator before the statement was taken.

As soon as A received B's statement, he contacted his insurance carrier and the investigator to determine why the statement had been taken contrary to the wishes of B's attorney. He learned that the statement had been authorized through the inadvertence of one of the carrier's employees. Immediately thereafter, A's counsel informed B's counsel that the statement had been taken and furnished him with a copy.

Prior to the investigator's taking B's statement, A's counsel had intended to depose B. He proceeded to take B's deposition, during the course of which B gave a version of the facts which was substantially in conflict with the statement that he had given to the investigator. Furthermore, the version of the facts differs in that the written statement essentially exculpates A from liability, whereas B's deposition does not clearly exculpate A.

During the deposition, A's counsel attempted to use the statement. However, his attorney objected and instructed him not to answer.

Based upon the foregoing facts, the attorney has posed the following questions to the Committee:

1. May A's counsel ethically make use of B's unauthorized statement during discovery and at trial?

2. May A's counsel ethically seek an order requiring B to submit to further deposition questions with respect to the contents of his unauthorized statement?

3. Do ethical considerations prevent B's counsel from providing plaintiff's counsel with a copy of B's unauthorized statement?

In Opinion No. 315, the Committee was confronted with a somewhat similar inquiry. At that time the applicable Rule of Professional Conduct was Rule 12, which provided that an attorney shall not communicate with a party represented by counsel upon a subject of controversy in the absence of and without the consent of such counsel. We there expressed the opinion that an insurance defense counsel could not avoid the proscription of Rule 12 by retaining an investigator to make an undercover contact with the plaintiff that the lawyer himself could not ethically do. In that opinion we expressed the further view that the insurance carrier's

counsel should not condone the use by the carrier without his knowledge of a private investigator to interview the plaintiff without the knowledge or consent of plaintiff's attorney and the sending of a report of the interview to defense counsel.

Rule 12 has now been replaced by Rule 7-103, which provides in pertinent part as follows:

"A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel."

To the same effect is DR 7-104(A), which reads as follows:

"During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party"

Here, unlike the situation presented in Opinion No. 315, there is nothing to suggest that A's counsel in any way initiated or instigated the taking of the statement from B nor do the facts indicate that the investigator was in any way affiliated or associated with A's counsel. Accordingly, we are of the opinion that there has been

no violation of either Rule 7-103 or DR 7-104(A), and we answer questions 1 and 2 in the affirmative and question 3 in the negative. In reaching this opinion, we have assumed that A's counsel acted in good faith with due diligence in attempting to prevent the investigator from taking the statement.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and this opinion is based only on such facts as set forth in the questions submitted.

OPINION No. 377

(October 10, 1978)

PUBLIC ENTITIES AND PUBLIC SERVANTS - PARTNERSHIP - GRATUITOUS

LEGAL SERVICES - CITY ATTORNEY - CONFLICTING INTERESTS

APPEARANCE OF IMPROPRIETY

A program wherein attorneys may perform volunteer legal services on a part-time basis for a governmental criminal prosecutor's office is proper under certain circumstances.

Rules interpreted: 4-101, 5-102; ABA DR 9-101(B)

Opinions cited: L.A. 108, 242, 273, 276, 333, 352;
ABA 30 and 34; A. G. Op. CV 77-118

Case law cited: People v. Rhodes, 12 Cal.3d 180 (1974)
In Re Charles L., 63 C.A.3d 760 (1976)
Younger v. Superior Court, 77 C.A.3d 892 (1978)
Jeffry v. Pound, 67 C.A.3d 6 (1977)

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An opinion has been requested concerning a program which would involve the utilization of volunteer private attorneys performing criminal prosecutorial duties for the City Attorney as follows:

1. Attorneys desirous of trial training and experience could volunteer for the program.
2. The program would involve a training program to insure competency, and then trial work for the agency which may include several discrete time periods over a period of years.
3. There would be no payment of any funds between the volunteer attorneys and the agency.

The Committee is of the opinion that such a program can be ethically conducted, although there are some areas of potential problems which should be noted and which are discussed below. The Committee assumes that the agency utilizing the proposed volunteer panel would only do so if the program and the volunteers selected would not lessen the quality of justice.

The most important consideration raised by the inquiry is the possibility of actual or potential representation of adverse and conflicting interests when the attorney who is a volunteer prosecutor is at the same time involved in a criminal defense matter with the same governmental agency. Here, though the proceedings would be unrelated, California Rule 5-102 would prohibit the representation since the lawyer is, in effect, engaged in litigation in favor of and against the same person at the same time. See Jeffry v. Pound, 67 C.A.3d 6 (1977).

California Rule 5-102 would also seem to apply where the criminal defense is against the same governmental agency, but the defense lawyer was not the volunteer prosecutor but rather a lawyer from the volunteer's law office, in light of the traditional theory that knowledge of one lawyer is attributed to all in the firm. See In re Charles L., 63 C.A.3d 760 (1976); Younger v. Superior Court, 77 C.A.3d 892 (1978); L.A. Op. 242; ABA Ops. 33, 49.

Representation by the volunteer lawyer in any criminal defense during the active part of the program, regardless

of identity of the governmental agencies involved in the two proceedings, is improper on the ground that it would involve the appearance of impropriety. See L.A. Ops. Nos. 276, 273 and 242; ABA Ops. Nos. 30 and 34; Drinker, Legal Ethics, pp. 118-119; People v. Rhodes, 12 Cal.3d 180 (1974).

However, where it is another lawyer from the same office as the volunteer who is defending a criminal prosecution and that prosecution involves another governmental agency, the existence of the appearance of impropriety may be doubtful. The ethical propriety might depend upon whether the firm does a significant amount of criminal work or whether the representation is incidental to a generally non-criminal defense practice. The facts that the volunteer does not have prosecutorial discretion, is not trying major cases, and has rather low public visibility should be taken into account.

The authorities disagree as to whether the conflict, and thus the appearance of impropriety, can be cured by consent of the governmental agency. A.B.A. Op. No. 34 suggests that a governmental agency cannot give such consent. On the other hand, A.G.Op. CV 77-118 (1-5-78), Vol. 61, p. 18, states that such consent may be proper where the actions are unrelated. We believe that the better reasoned authority is that consent can be given where the cases are unrelated.

The Committee is of the opinion that it is not a conflict per se for a participant volunteer or a member of the firm to represent a client in a non-related civil action against the agency. But if the

matters were related (e.g., where the same incident leads to a personal injury case and a drunk driving prosecution), then an actual conflict might exist (See L.A. Ops. 108 and 333). Further, it should be noted, as set forth in L.A. Ops. 108, 333 and 352, there are some conflicts which divide the loyalty of an attorney--where one client gains at the other's expense--which cannot be waived or consented to by the clients.

If a conflict exists, the Committee has considered its effect on the volunteer and firm after withdrawal of the volunteer from active participation in the program. If the program requires the volunteer to take responsibility at a later date for cases which the volunteer handled during active participation of the volunteer in the program, the conflict continues for as long as the attorney has such responsibility. Furthermore, a conflict continues as to those particular matters in which the volunteer had a substantial responsibility during the program (ABA DR 9-101(B)). But the conflict does not continue otherwise merely because the volunteer will try some more cases at a later date.

Finally, the Committee has considered whether or not there should be any change in the application of ethics rules in this matter because it is characterized as a "volunteer" or pro bono program. It appears to the Committee that the potential problems are of sufficient public interest that the rules of ethics must fully apply to this proposed program, whether it is pro bono or otherwise.

In conclusion, the Committee finds that there is no rule of ethics which prohibits the proposed program, but that there

are potential problems, particularly conflicts and the appearance of impropriety, which might occur and should be recognized and avoided.

This Opinion is advisory only. This Committee acts upon specific questions submitted ex parte, and its opinion is based only on such facts as are set forth by the inquiring attorney.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 378

(December 12, 1978)

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CONFIDENTIAL INFORMATION - LEGAL SERVICES PROGRAM -
RESEARCH BY NON-ATTORNEY. A non-attorney, undertaking a research project involving a legal services program sponsored by the Local Bar Association, may not, without the client's consent, be given summarized information containing a client's confidential information even though the client is not named and the information is in a form that could not reasonably be expected to reveal the client's identity.

Rules interpreted: DR 4-101(b); Cal. Bus. & Prof. Code §6068(e).

Opinions cited: 358; ABA Inf. Op. 1287, 1150, 762;
N.Y. St. Bar Op. 485; Ore. Op. 105;

Case Law Cited: People v. Canfield, 12 Cal. 3d 699
(1974).

The Committee has been asked to consider the following facts:

A faculty member of a university proposes to study a project which is supported by a local bar association. The project provides services to residents who are receiving treatment in two institutions, after executing written agreements with each client.^{N/} Project members are attorneys and paralegals who work under the supervision of the attorneys. The project's purpose is to aid residents with legal problems, especially those relating to their institutionalization. Project members provide counselling and other services, including representation in administrative (but not judicial) proceedings.

The research study seeks to evaluate the effectiveness of the project. In order to do so, the researcher wishes to interview the project's staff (paralegals and supervising attorneys) and to review unidentified case summaries prepared from the project's client files. The researcher proposes to have the project's own staff prepare the case summaries by excerpting the following information:

1. Month or quarter of hospital admission.
2. Length of stay, if discharged already.
3. Legal status at time of admission.

^{N/} The Committee does not know the nature of these written agreements but assumes from the nature of the inquiry that the agreements do not authorize project participants to disclose client confidences.

4. Legal status at time of referral to attorney.
5. Source of referral to attorney (using project categories).
6. Month or quarter of referral to attorney, plus number of days since admission.
7. Treatment unit(s).
8. Presenting complaint.
9. A listing of all complaints recorded
 - actions taken to address those complaints, including numbers of days since complaint was noted.
10. Diagnosis.
11. Previous hospitalization? Yes or no.

In addition, the researcher proposes to interview existing and former project paralegals and staff attorneys to ascertain their views as to the effectiveness of the project through a series of specific questions. Copies of those questions have been submitted to the Committee and appear well designed to avoid the inadvertent disclosure of client confidences.

The Committee is asked:

(1) May the project release summary information which has been digested and summarized from the project's client files by a project member who is paid to do the summaries by the researcher, without the client's consent?

(2) May the project do so with the client's consent?

(3) What, if any, limitations should be required in preparing or transmitting such information if such summaries are acceptable including:

(a) guidelines for determining how detailed such summaries may be;

(b) whether such summaries may be prepared for individual clients;

(c) if a project staff attorney reviews such summaries prior to their release to the investigator, would this protect clients sufficiently to permit such release?

(4) May project staff members who have direct client contact (attorneys, advocates, clerical staff) participate in interviews with the investigator?

(a) If so, may they do so without the client's consent; or

(b) with the client's consent?

(c) If they may participate, what limitations (if any) should bind them during such interviews?

A recent Opinion by this Committee (Los Angeles County Bar Opinion No. 358) discusses the duty of staff attorneys of a public legal services foundation to maintain the confidences of their clients. That Opinion concerned the question of whether staff attorneys could disclose financial data supplied by the client to the foundation's Board of Directors, in order to allow the Directors to conduct an independent investigation of the client's eligibility for free service. The Committee held that, under ABA Code DR 4-101(b)(1) and California Business & Professions Code §6068(e), the information in question was protected by both the attorney/client privilege and the broader ethical duty to maintain a client's secrets and, therefore, could not be disclosed to the Board of Directors against the client's wishes regardless of the nature or source of information, or the fact that others share this knowledge. The Committee cited People v. Canfield, 12 Cal. 3d 699 (1974), which holds that when a person seeks assistance from an attorney with the purpose of employing him, any information acquired by the attorney is privileged whether or not employment results and whether or not the information is given to a member of the attorney's staff, who is not himself an attorney. A number of ABA Opinions also deal with the duty to maintain confidences, as applied to

legal aid organizations, and have found that "the duty to a Legal Services" client is no less than that owed to any other client". ABA Informal Opinion 1287 (1974), quoting ABA Formal Opinion 250.

In this inquiry, we assume that information in the Project's files is covered by the attorney/client privilege and by ABA Code DR 4-101(b)(1) and California Business & Professions Code §6068(e). Although the Project's work is largely conducted by non-attorneys, there is an attorney/client relationship between the Project's staff attorney and its clients, and the non-attorney staff members' functions as agents of the attorney. Similarly, we may assume that the type of information requested, which relates in part to the fact of, and reasons for, voluntary or involuntary confinement in an institution, is by its nature highly confidential and may not be disclosed without consent in the ordinary course of events.

The fact situation before this Committee, however, differs from that considered in its Opinion No. 358 as well as that in ABA Informal Opinion 1287, since the research protocol does not require disclosure of clients' names. The inquiry states that Project staff members will excerpt information from client files and give the excerpted information to the researcher in summary form. This excerpted information will not

contain a statement of the client's identity
parently assumed that the excerpted informa
to permit deduction of the client's identity.
thus, is being asked whether information which is c
confidential may be disclosed for the purposes of resea
when it is sufficiently disguised that it is unlikely to be
connected to the client from whom it was obtained.

This question appears to be one of first impression.
Prior Opinions of the ABA and other Bar Associations have
discussed the disclosure of confidences to individuals seek-
ing research data: New York State Bar Opinion 485 (1978);
ABA Informal Opinion 1287 (1974); ABA Informal Opinion 1150
(1970); ABA Informal Opinion 762 (1964); Ore. Opinion 105
(1962). Each of these Opinions, however, involved fact situa-
tions in which the client's identity would be disclosed. In
this case, however, the client's identity will not be dis-
closed and is unlikely to be ascertainable.

It is assumed by those making the inquiry, and the
Committee agrees, that confidences identifiable to the
client could not be disclosed without the client's consent.
Since there are numerous reasons why a client might not wish
information transmitted in confidence to his attorney to be
disclosed, whether or not the client is identifiable as the

source, and since the Committee has no means of ascertaining the clients' expectations when they agreed to consult the Project's personnel, the Committee is of the opinion that unidentified confidential information of clients cannot be disclosed by Project personnel absent the client's consent.

It may well be that the excerpting techniques suggested will have the effect of so capsulizing the information that it is, in fact, no longer confidential in nature. Only the Project attorneys can make that determination. If confidential information would, however, be included it cannot be released absent the client's consent. No doubt the client's consent will be the more readily objectionable the less identifiable is the information to be provided. Nonetheless, the stringent language of California Business and Professions Code §6068(e) indicates that an attorney is under a duty to take all steps necessary to assure that clients' confidences are not disclosed without the clients' consent.^{N/}

The Committee concludes, therefore:

- I) The Project may not release digested and summarized confidential information without the client's consent;

^{N/} §6068(e) provides:

"It is the duty of an attorney:

(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

- 2) Project staff members may participate in interviews with the researchers without their client's consent but must not disclose client confidences during the interviews;

This Opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts as are set forth by the inquiring attorney.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 379

(May 8, 1979)

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ATTORNEY AND CLIENT - DUTY TO ACT COMPETENTLY -
PAYMENT OF EXPENSES - PRO BONO SERVICES.

An attorney may, but is not obligated to,
pay costs and expenses resulting from
litigation or other legal matters on behalf
of a client whom the attorney represents
on a pro bono basis, provided the client
remains ultimately liable for such expenses.

AUTHORITIES CITED:

Rules 5-104, 6-101

ABA Code EC 2-25, DR 5-103, DR 6-101

B&P Code Sec 6068(h)

The Committee's opinion has been requested concerning the
ethical obligations of an attorney in connection with payment
of costs and expenses resulting from litigation or other legal
matters on behalf of a client whom the attorney represents on
a pro bono basis. This opinion is requested generally with
reference to attorneys who participate on a pro bono panel of
a Bar Association's Lawyer Referral Service or otherwise
represent clients on a pro bono basis.

In Payne v. Superior Court, 17 Cal. 3d 908 (1976), the California Supreme Court held that indigent prisoners who are named as defendants in civil actions have a constitutional right to counsel where no other relief will preserve their right of access to the courts in defense of these actions. The Committee has been asked the following specific questions relating to the ethical obligations of attorneys who are appointed to handle the defense of indigent civil defendants under the Payne decision:

1. If the indigent client is unable to pay the costs for discovery or for employment of expert witnesses whose testimony is necessary to the defense, does the attorney appointed under Payne have an ethical obligation to pay such costs so that his client will not lose a potentially meritorious defense?
2. Will an attorney appointed to represent an indigent prisoner be regarded as failing to use reasonable diligence and to act competently where there are no funds available to finance discovery and necessary experts and these financial constraints render it impossible to provide an adequate defense?

Section 6068(h) of the California Business and Professions Code provides that it is the duty of an attorney "never to reject, for any consideration personal to himself, the cause

of the defenseless or oppressed." The ABA Code of Professional Responsibility states:

"The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." (EC 2-25)

"The professional responsibility to contribute public interest legal service is inherently an obligation to contribute one's time - one's abilities." (Special Committee on Public Interest Practice of the American Bar Association, Implementing the Lawyer's Public Interest Practice Obligation, p. 6.)

It is the opinion of the Committee that an attorney who is appointed to represent an indigent civil defendant under the Payne decision, or who engages in any other pro bono representation of a client, is not obligated to pay costs for discovery or employment of expert witnesses or other costs which the client cannot afford. In the only opinion which we have found bearing on this subject, but which did not deal directly with litigation costs, this Committee stated that it "is not aware of any provision of the Canons of Ethics which require[s]

an attorney to advance such expenses out of his own pocket."
(Los Angeles County Bar Association Informal Opinion 1954-5.)

Rule 6-101(2) requires a member of the State Bar "to use reasonable diligence . . . in the exercise of his skill and in the application of his learning in an effort to accomplish . . . the purpose for which he is employed." ABA Code DR 6-101(A) provides that a lawyer shall not "handle a legal matter without preparation adequate in the circumstances."

In the opinion of the Committee, an attorney does not fail to act competently where the attorney uses reasonable diligence in devoting his or her time, skill and learning on behalf of the client, but limits his preparation of the case in terms of discovery or employment of expert witnesses due to the financial circumstances of the client.

The question remains whether an attorney who represents an indigent prisoner or other client on a pro bono basis may pay costs and expenses in connection with litigation or other legal matters.

Rule 5-104(A) provides as follows:

"(A) A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for

a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:

* * *

(3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client."

ABA Code DR 5-103(B) provides:

"While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

ABA Informal Opinion 1361 holds that a Legal Service Office may assume ultimate responsibility for costs of litigation on behalf of poor clients who are eligible for free legal services. It states: "It goes without saying that poor clients who are eligible for free legal services, should not be deprived of the necessary preparation for litigation or the access to remedy of a class action suit because they are unable to assume the ultimate responsibility for out-of-pocket costs."

California State Bar Formal Opinion No. 1976-38 holds that it is not ethically improper for an attorney to advance litigation costs where there is a substantial likelihood that the client will not be able to repay such costs absent a recovery in the action, provided that the client remains ultimately responsible for the costs advanced.

In the opinion of this Committee, an attorney who represents a client on a pro bono basis (i.e., either without payment of attorneys' fees or solely for attorneys' fees which the court may, by statute, award to the successful attorney in litigation vindicating rights provided by the Constitution or by statute) may, but is not obligated to, pay costs and expenses incurred in connection with litigation or other legal matters, even where there is a substantial likelihood that the client will not be able to repay such expenses absent a recovery in the action, provided the client remains ultimately liable for such expenses.

The Committee also believes that California Rule 5-104(A)(3) and ABA Code DR 5-103(B) should be changed to eliminate the requirement in these circumstances that the client must remain ultimately liable for such expenses.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and this opinion is based only on such facts as are set forth in the questions submitted.

LOS ANGELES COUNTY BAR ASSOCIATION
ETHICS COMMITTEE
OPINION NO. 380
(August 14, 1979)



ATTORNEY AND CLIENT: An attorney has no duty to inform the opposing party of a mistake of law which was a factor in the parties' reaching a settlement.

AUTHORITIES CITED:
Cal. Bus. & Prof.
Code §6068(c)
ABA DR 7 - 102 (A) (2)
ABA EC 7-9
ABA EC 7-23
Former ABA Canon 22

The Committee's opinion has been requested in connection with the following:

The inquiring attorney was substituted as attorney for the plaintiff in a personal injury action. It appeared that plaintiff's first attorney had filed the complaint after the expiration of the statute of limitations. The inquiring attorney entered into a settlement with the first attorney's malpractice insurer based upon a Court of Appeals decision which, when applied to the facts of his client's case, held that the complaint was filed late. Following the settlement and advising his client thereof, the attorney learned that, prior to the settlement, the Court of Appeals' decision, upon which it was based, had been overruled. Under the new ruling, the complaint was filed on time, the plaintiff's action was not barred, and the first attorney therefore may not have been guilty of

malpractice. The inquiring the attorney asks:

1. Is he obligated to advise the insurance carrier of the change in law and enter into a mutual rescission of the settlement, or may he collect the settlement for his client.

2. May he proceed with the personal injury action and, if successful, obtain a second recovery for his client.

3. Should he dismiss the personal injury action, or would this be a violation of his duty to his client and constitute malpractice.

Cal. Bus. & Prof. Code §6068(c) provides in part, that it is the duty of an attorney "To Counsel or maintain such actions, proceedings or defenses only as appear to him legal or just...."

EC 7-9 provides that: "In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interests of his client seems to him to be unjust, he may ask his client for permission to forego such action."

Former ABA Canon 22 provides, in part, that: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."

"It is not candid or fair for a lawyer...with knowledge of its invalidity, to cite as authority a decision that has been overruled...."

EC 7-23 provides, in part, that: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part." [Emphasis added.] The Committee is of the opinion that EC 7-23 imposes no duty upon the lawyer to inform an adversary where a claim has been settled between them and is not before any tribunal.

DR 7-102 (A) (2) provides that in the representation of a client, a lawyer shall not, with certain exceptions, "knowingly advance a claim or defense that is unwarranted under the existing law...." In the present instance the settlement was made prior to the lawyer's becoming aware of the change in the law.

The Committee assumes that there was no lack of candor in reaching the settlement as it appears that all parties acted in good faith. The Committee is of the opinion that one of the risks assumed in entering into a settlement is that the law may change after the settlement is made. Therefore the Committee believes that there is nothing illegal or unjust in collecting the settlement and the attorney is under no obligation to advise the insurance carrier of the

mistake of law which was a factor in reaching the settlement.

{ Whether or not this is the kind of mistake that would call for a rescission of the settlement agreement is a legal question }
on which the Committee expresses no opinion. It is the duty of the attorney to discuss with his client the risk of a possible rescission action if the settlement is carried out.

If the settlement is carried out, the attorney is not required to dismiss the personal injury action except to the extent that Bus. & Prof. Code 6068 (c) may prohibit maintaining an action which would result in a double recovery for his client. The extent to which such action would constitute a double recovery is a legal question upon which the Committee expresses no opinion. The attorney should discuss with his client the prohibition against a double recovery.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the questions submitted.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 381

(September 20, 1979)

ADVERTISING AND SOLICITATION - PROFESSIONAL CARDS - LAY EMPLOYEES. It is not improper for an attorney or law firm to provide or permit the use by a lay employee of a card, designating such employee's position, with the employer-attorney or firm identified as a lawyer or law firm, unless the card is used in connection with an improper solicitation or communication seeking professional employment for an attorney.

AUTHORITIES CITED:

Rule 2-101 (new)
Rule 2-101 (repealed)
Rule 2-102 (repealed)
Rule 2-103 (repealed)
L.A. Opinion No. 346
ABA Opinion No. 909
ABA Opinion No. 1185

The Committee has been asked to reconsider its Opinion No. 346 issued March 20, 1975, in light of the recent repeal and revision of California Rules of Professional Conduct 2-101 and 2-102.

The question presented in paragraph (a) of Opinion No. 346 is:

"whether a lay person, such as a paralegal specialist, business personnel or service manager, data processing manager, secretarial supervisor, or service supervisor, employed by a law firm may be provided with business cards for his or her use in providing the information contained on the card to such persons who would otherwise receive the

information orally. The sample cards submitted contain the name of the non-lawyer, his or her position, the name, address and telephone number of the law firm, and the identification of the law firm as 'attorneys at law'."

Relying upon Rules 2-101, 2-102 and 2-103, all of which have now been repealed, the Committee concluded in Opinion No. 346 that..."Since neither an attorney nor a law firm may employ such business cards under the rules discussed, neither may the non-legal personnel of the law firm be allowed by an attorney or law firm to use such cards."

Use of the card by a lay employee as a means of solicitation or "communication" seeking the employer's professional employment from a potential client for pecuniary gain may violate new Rule 2-101 (B) which provides:

"No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding the potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the

solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

It is the opinion of the Committee that if use of such a card by a lay person is merely a means of identifying the individual and his employer it is not a communication within the meaning of new Rule 2-101.

To the extent that this opinion is inconsistent with prior L.A. Opinion No. 346, the prior opinion is overruled. Our present opinion is in conformity with ABA Informal Opinions numbers 909 and 1185.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the questions submitted.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 382

(DECEMBER 11, 1979)



AVOIDING ADVERSE INTEREST - FEES - PROBATE
Absent an express statement in the will to the contrary, it is improper for an attorney who has prepared a will to claim attorney's fees in a probate proceeding as attorney of record for the executor where the attorney's secretary is the executor and is claiming executor's commissions.

Rules Interpreted: Calif. Rule Prof Conduct 5-102(B)
ABA Code Prof. Resp. DR 5-101(A)
Opinions Cited: L.A. Formal Op. 219 (May 14, 1954)
L.A. Formal Op. 347 (April 24, 1975)
Colorado Bar Association, Op. 21 (July 20, 1962)
Case Law Cited: Estate of Anderson (1958) 166 Cal.2d 39
Estate of Crouch (1966) 240 Cal.App.2d 801
Estate of Lair (1945) 70 Cal.App.2d 330
Estate of Lankershim (1936) 6 Cal.2d 568
Estate of Miller (1968) 259 Cal.App.2d 536
Estate of Parker (1926) 200 Cal. 132
Estate of Thompson (1958) 50 Cal.2d 613

The Committee has been requested to render its opinion in respect to the following query:

"Is it ethical for a lawyer engaged as a sole practitioner employing one legal secretary to claim attorney's fees in a probate proceeding as the attorney of record for the executor where the lawyer's secretary is the executor and is claiming executor's commissions? The lawyer prepared the will in question."

The Committee assumes that the will in question does not expressly authorize the dual compensation to the attorney and to his secretary.

Absent an express agreement in the will authorizing compensation to the executor and for legal services (Estate of Thompson (1958) 50 Cal.2d 613, 615; Estate of Crouch (1966) 240 Cal.App.2d 801, 802), an attorney may not be compensated for both attorney's fees and executor's commissions where the executor, being also a practicing attorney, elects to act as his or her own lawyer. (Estate of Parker (1926) 200 Cal. 132, 135-137; Estate of Lankershim (1936) 6 Cal.2d 568, 572; Estate of Lair (1945) 70 Cal.App.2d 330, 336). This rule is one of public policy which forbids one who acts in a fiduciary capacity to become his or her own employer (Estate of Lair, supra at 336). Thus it becomes unprofessional conduct for an attorney to receive double compensation for performing the functions of both a personal representative and legal counselor in the absence of a statement by the testator that this is permissible. (L.A. Opinion 347, April 24, 1975).

Where an attorney acts as executor for an estate and a law partner becomes the attorney for that executor, the estate may not be charged for the legal services rendered except where there is an agreement among the partners that the executor will not share in the fee for legal services charged by the partnership. (Estate of Parker, supra at 137; Estate of Anderson (1958) 166 Cal.2d 39, 43.) The propriety of an attorney claiming executor's commissions together with the firm claiming attorney's fees, even where explicitly authorized by the will, has been questioned. (Estate of Miller (1968) 259 Cal.App.2d 536, 540.) An ethics opinion of another jurisdiction has held that where a lawyer serves as executor of an estate and his partner serves as attorney for the estate, the

partners may not ethically charge both an executor's fee and an attorney's fee for services rendered. (Colorado Bar Association, Opinion 21, July 20, 1962.) *

Given this background, the Committee addresses the query presented herein.

An attorney shall avoid representation of conflicting interests absent the written consent of all parties concerned (California Rules of Professional Conduct, rule 5-102(B)). An attorney must also avoid a conflict between the interests of his client and the attorney's personal interests (ABA Code of Professional Responsibility, DR 5-101(A)). Where an attorney who drafts a will employs a secretary who is executor of the estate, and that attorney also becomes legal counsel for the executor, a conflict of interest occurs. The attorney has become both the employer and employee in respect to a fiduciary relationship with the estate, for the attorney employs the executor who in turn must rely upon the attorney for legal services. Moreover, the attorney has placed the secretary-executor in an untenable position. The secretary, as trustee of the estate, must insure that no improper charges are made against the estate by those persons employed by the estate

* L.A. Opinion 219 (May 14, 1954) held that it was proper for an attorney, who is also legatee under a will, to serve as one of the executors of an estate as well as trustee in respect to testamentary trusts, and for the attorney to employ his law partners as attorneys, provided compensation for the respective duties was kept separate and apart. Opinion 219 does not suggest that the executor sought or received commissions for his service. Further, L.A. Opinion 347 (April 24, 1975) cites Opinion 219 for the proposition that a person shall not ethically receive compensation for performing the functions of both a personal representative and an attorney in the absence of a statement by the testator approving the arrangement. Thus it is doubtful that Opinion 219 addressed the query posed herein. To the extent that Opinion 219 is in conflict with Opinion 382, Opinion 219 is overruled.

(Estate of Parker, supra at 137). Yet the secretary is also the attorney's subordinate, agent, and employee who depends upon the attorney for a livelihood.

The conflict of interest has been created by the attorney drafting the will which appointed the secretary as executor. The conflict may not be rectified by an agreement between the attorney and the secretary which would provide that the attorney could not share in the executor's commissions. Irrespective of any agreement, the attorney still effectively remains his or her own employer in respect to fiduciary matters involving the estate as long as the secretary is executor. Therefore, in order to ameliorate the conflict created, the attorney may not ethically claim attorney's fees as attorney of record for the executor.

This opinion is advisory only. The Committee acts only upon specific questions submitted ex parte and its opinions are based only upon such facts as are set forth in the questions presented.



LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 383

(December 11, 1979)

ATTORNEY AND CLIENT - INCOMPETENT ATTORNEY -
DUTY TO CLIENT - CONFLICTING INTERESTS.
Every attorney, including an associate in
a legal partnership, must exercise his
professional judgment in the best interest
of his clients and must take steps which
are necessary to assure competent
representation for his client or withdraw
from the case.

AUTHORITIES CITED:
Rules of Professional
Conduct-6-101(1); Ethical
Considerations - EC 5-1, EC 5-12.

An inquiry has been made regarding the responsibility that an associate of a law firm has to a client of a partner with whom he is working when the partner, who also is working on the matter, commits malpractice or is incompetent. Because the determination of malpractice or incompetency is a legal matter on which this committee expresses no opinion, it will be assumed for purposes of this opinion that the partner has committed malpractice or is incompetent.

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest nor desires of a third person should be permitted to dilute his loyalty to his client. (ABA-EC 5-1.) A legal partnership which hires

associate attorneys to represent clients of the firm possesses a potential power to exert substantial pressure on the independent judgment of the associate attorneys. Accordingly, an associate must carefully guard against erosion of his professional freedom and independent judgment. (ABA-EC 5-23.)

When an associate attorney has concluded that a partner in the firm has committed malpractice or is incompetent with respect to the handling of a client's affairs, the matter should be brought to the attention of the partnership in an effort to agree upon a course of conduct with regard to the client which will insure competent representation. If the malpractice has adversely affected the client's interest and cannot be rectified or, if the associate and the partnership cannot agree on a method of providing competent representation to the client and protecting the client from any adverse effect of past malpractice, the disagreement regarding representation or the impairment to the client's interest as a result of the malpractice must be thoroughly disclosed to the client, notwithstanding an objection by the partnership, for the client's resolution, and the decision of the client shall control the action to be taken. (ABA-EC 5-12.) Furthermore, if the associate believes the effectiveness of his representation of the client has been or will be impaired by the activity of the partner, the associate should take proper steps to remove

himself from the representation of the client.

California Rule 6-101(1) provides that a member of the State Bar shall not habitually perform legal services for a client if he knows or reasonably should know that he does not possess the learning or skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill. Assuming that the partner is not competent to handle a particular matter for the client and that the associate who has been assigned to the matter and is working with the client does possess the requisite learning and skill, then the fact of the incompetence of the partner, assuming malpractice has not previously occurred, does not require remedial action so long as the associate or competent lawyer consulted by the incompetent partner is in charge of or can assure the protection of the client's interests.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.



LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 384

(April 8, 1980)

ADVERTISEMENT AND SOLICITATION -- DUAL OCCUPATION.

An attorney who is also a real estate broker may advertise and practice both occupations together from the same office, and may act as a broker and as an attorney in the same transaction, provided he complies with all applicable rules of professional conduct. Prior opinions modified in light of amended rules regarding advertising and solicitation.

AUTHORITIES CITED:

Rules 2-101, 3-101, 3-102, 5-102
Rule 2-103 (Repealed)
L. A. Opinions Nos. 224, 225, 262,
282, 351, 372
ABA DR 2-101, DR 2-102(E)
ABA Opinion No. 328
Business and Professions Code
Sections 6150 et seq.

An attorney who specializes in real property law also is a licensed real estate broker. When acting as a broker the attorney arranges purchases, sales and financings of real property and is compensated for his services by the seller, the borrower, or the lender. The attorney desires to know whether he may conduct both businesses from the same

office. He also wants to know to what extent he may advertise his ability to act, and to what extent may he act, not only as a broker but also as an attorney for one of the parties in a given real estate purchase or financing transaction.

Even prior to the recent amendments to the various Rules regarding advertising and solicitation, it was clear that a lawyer could simultaneously engage in another occupation or business. Opinions so indicating were based upon the fact that there was no rule specifically prohibiting a lawyer from engaging in more than one occupation, and the inferential approval of dual practice formerly contained in Rule 2-103(E) and still contained in DR 2-102(E). However, it was this Committee's opinion that the dual occupations must be carried out in different locations. L. A. Opinions Nos. 224, 225, and 351. In addition, former Rule 2-103(E) specifically prohibited an attorney who is engaged both in the practice of law and another profession or business from so indicating on his letterhead, office sign or professional card, and prohibited the attorney from so identifying himself as a member of the State Bar in any publication in connection with his other profession or business. One opinion, L.A. Opinion No. 282, specifically prohibited a lawyer from engaging in a real estate brokerage business.

Rule 2-103(E) has now been repealed, although the comparable ABA Rule, DR 2-102(E), still remains. In addi-

tion, the prefatory language in Rule 2-101 as amended now states:

"This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel. Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these Rules." (Emphasis added.)

The opinions which prohibited attorneys from conducting a dual practice in one office were based principally upon the former prohibition against advertising and solicitation (former Rule 2-101). Even prior to the amendments to DR 2-101 permitting certain limited forms of publicity, the ABA permitted one-office dual practice. See ABA Opinion No. 328. Because of the amendments to Rule 2-101 and related Rules, including the repeal of Rule 2-103(E), our Opinion No. 282 and our other prior opinions specifically disapproving one office dual practice are hereby superseded.

Nevertheless, the attorney who is also engaged in another occupation may find it difficult to advertise and practice both occupations together without violating (a) amended Rule 2-101 or (b) other applicable rules of conduct.

(a) Rule 2-101.

While Rule 2-101 as amended does not specifically address the problem of attorneys who are engaged in another occupation, the attorney must scrupulously comply with the provisions of Rule 2-101 with respect to all "communications" as defined therein. The attorney should be particularly concerned that any communication not contain any matter or present or arrange any matter in a manner or format which is false, deceptive or which tends to confuse, deceive or mislead the public, or which omits to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public. An attorney who utilizes a single "communication" to publicize his ability to act as a broker and an attorney may find it particularly difficult to comply with this provision. However, because of the numerous ways in which the attorney might wish to make a "communication," it is impossible to give more specific guidance on this point.

It would seem particularly difficult for the attorney to comply with paragraph B of Rule 2-101 which provides in part:

"No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the poten-

tial client, nor shall a solicitation or 'communication' specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or 'communication' is protected from abridgement by the Constitution of the United States or by the Constitution of the State of California." (Emphasis added.)

It would appear that a person who came to the attorney seeking his services solely as a broker could not then be solicited in any manner for engaging the legal services of the attorney in the transaction involved without violating the second underlined portion of paragraph (B) above. If the attorney wishes to act as an attorney in a particular matter, he probably should assure himself that the client originally sought his services as an attorney in the first instance and not merely as a broker. (Of course, paragraph (b) of Rule 2-101 is expressly limited to the extent the United States and California Constitutions supersede the provisions of the Rule. This opinion will not attempt to discuss that issue and the reader is referred to current applicable law in that area.) This is consistent with the concern expressed in L. A. Opinion No. 262 where it was stated that in the situation involved, there would be a strong impetus for new clients to employ the attorney to do

the legal work necessary to carry forward transactions in which the attorney was not initially involved as such. As stated in such opinion:

" . . . a vicious practice may exist if in fact some of the clients automatically employ the attorney in his professional capacity in the belief that his services are part of the package deal offered by the two corporations in assisting them to enter into the home construction business."

Even though Opinion No. 262 was issued in 1959 and well before the recent amendments to the Rules of Conduct regarding solicitation, the concern expressed above still seems very applicable to the situation under consideration.

In addition, Paragraph (B) of Rule 2-101 prohibits any solicitation or communication made "in person" to the potential client. This is consistent with the decision of the United States Supreme Court in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). In that decision the Court emphasized the peculiar potential for harm posed by in-person solicitation. Again, unless the prospective client originally sought the attorney's services as an attorney as such, and not as a broker, it would appear difficult for the attorney to comply with this aspect of the Rule if he were to accept engagement by the client for performing legal services.

It should be noted that the ABA Code of Professional Responsibility also has been recently amended (DR

2-101-"Publicity") to specifically permit certain types of publication or broadcast of information in print media distributed, or over television or radio broadcast, in the geographic area or areas in which the lawyer resides or maintains his offices or in which a significant part of the lawyer's clientele resides. While DR 2-101(B)(12) specifically permits the lawyer to mention "technical and professional licenses" and Section 13 allows the lawyer to mention "memberships in scientific, technical and professional associations and society," DR 2-102(E) still prohibits a lawyer who is engaged both in the practice of law and another profession or business from so indicating on his letterhead, office sign or professional card and prohibits him from identifying himself as a lawyer in any publication in connection with his other profession or business.

Thus, the ABA Code of Professional Responsibility, while recognizing the increased need for dissemination of information which could permit laymen to select a lawyer on a more informed basis, still recognizes the danger of advising a dual occupation. However, the California Rules no longer prohibit the attorney from identifying both occupations on his letterhead, office sign or professional card.

(b) Other Rules of Professional Conduct.

The attorney engaged in the dual occupation also must still be concerned with complying with other applicable

rules of professional conduct, particularly if the attorney also acts as a broker in the same transaction. For example, the attorney must scrupulously avoid any conflicts of interest. The risk of such conflicts in the situation at hand appears to be particularly great because the attorney, if initially engaged solely as a broker, may become privy to information while acting solely as a broker which he would not have obtained if he had acted only as an attorney for one of the parties from the inception of the transaction. It should also be noted that brokers often represent both parties to a transaction, and because of their compensation arrangement typically have a personal financial interest in the success of a transaction. Even if at the outset of a transaction it appears that there would be no conflicts of interest, it seems likely that conflicts will arise sooner or later which would place the attorney in an awkward position. For example, an attorney acting as broker for a seller probably could not also act as attorney for the buyer in the same transaction See Rule 5-102.

If non-lawyers are involved in the attorney's business as a broker, it is also possible that, depending upon the manner in which the business is conducted, they could, either inadvertently or otherwise, become engaged in the unauthorized practice of law. The attorney's participation in the business must be in such a manner that he does not aid a non-lawyer in the unauthorized practice of law.

Rule 3-101. What constitutes the unauthorized practice of law is a legal question, not an ethical one. L.A. Opinion No. 166.

The attorney also must take care that any financial arrangements with non-lawyers not violate any of the provisions of Rule 3-102 regarding the sharing of legal fees with persons not licensed to practice law.

Where, as in this case, the lawyer's other profession is law-related, another ethical difficulty is encountered. It may be impossible to know whether the lawyer's work for a client is performed as part of the practice of law or as a part of the lawyer's other occupation. This problem is discussed at some length in ABA Formal Opinion 328. There it is stated that in carrying on law-related occupations and professions the lawyer almost inevitably will engage to some extent in the practice of law, even though the activities are such that a layman can engage in them without being engaged in the unauthorized practice of law. "If the second occupation [such as a real estate brokerage business] is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law while conducting that occupation. Accordingly, he is held to the standards of the bar while conducting that second occupation from his law offices. With this qualification, the lawyer may carry on a law related occupation . . . from the same office."

For example, publicity given to the second occupation and methods of seeking business must be in accordance with Rule 2-101. The lawyer may have a duty to preserve confidential information acquired in carrying out the second occupation even though others engaged in that occupation do not have a similar duty. Similarly, the lawyer may, in connection with the second occupation, owe a duty as a fiduciary even though the relationship of others in that occupation to their clients and customers is not that of a fiduciary.

The Committee wishes to emphasize the difficulties which may be encountered in complying with the foregoing requirements. In addition, prior opinions have stated that while engaging in an independent business is permissible, it should be generally looked upon with disapproval as "tending to lower the essential dignity of the profession." See, e.g., L. A. Opinion No. 262. However, if the attorney is willing to undertake the substantial risks of ethical infraction entailed in publicizing and carrying on the proposed dual businesses, or in acting as a broker and as an attorney in the same transaction, the Committee is of the view that there would be no impropriety in the proposed conduct.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.

FORMAL OPINION NO. 385



ATTORNEY AND CLIENT - DIVISION OF FEES -
BRANCH OFFICE-FIRM NAME

An attorney admitted to practice law in California may become a California "resident partner" of a New York based law firm specializing in immigration matters and may divide fees with the New York law firm, provided the fee sharing arrangement is disclosed to clients.

AUTHORITIES CITED:

Rules of Professional Conduct
2-101; 2-108; 5-102; 6-101. ABA
Code DR 5-105. L.A. Opinion Nos.
230, 269, 290, 295 and 325.

The Committee has been asked about the propriety under the Rules of Professional Conduct of accepting a "resident partnership" in a law firm based in New York which specializes in immigration and naturalization law.

The New York law firm, A & B, has developed a large immigration practice with emphasis placed on systematizing the processing of a large volume of cases. It is now seeking to expand its program by establishing branch offices in major cities throughout the United States with "resident partners" admitted to practice in their respective states.

Under the "resident partnership" proposal, all immigration cases will be forwarded to and processed in the New York processing center of A & B, which is staffed with lawyers and paralegals who are trained to handle immigration cases. The branch offices will originate cases and act as liaisons between the clients and the New York processing center, and clients will communicate directly with lawyers and paralegals in New York. In matters relating to immigration laws, the "resident partner" will be required to use the letterhead and firm name of A & B. In other matters the "resident partner" will continue to use his present firm name.

The "resident partner" will execute a partnership agreement with A & B, at which time a partnership contribution of \$30,000 will be required. Fees in all immigration matters originated by the "resident partner" will be divided equally with 50% to A & B and 50% to the "resident partner." A & B will not be entitled to share in any fees derived from the "resident partner's" law practice in matters not related to immigration laws. The "resident partner" will be required to promote A & B's services through mass-media advertising, with the advertising costs to be paid 50% by A & B and 50% by the "resident partner."

Rule 2-108(A) of the California Rules of Professional Conduct provides as follows:

"A member of the State Bar shall not divide a fee for legal services with another person licensed to practice law who is not a partner or associate in the member's law firm or law office, unless:

(1) The client consents in writing to employment of the other person licensed to practice law after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees and does not exceed reasonable compensation for all services they render to the client."

Although it is contemplated that the "resident partner" will enter into a partnership agreement with A & B, it is unclear whether the "resident partner" will be a "partner" of A & B in the sense contemplated in Rule 2-108(A). We believe that "partner" is used in the sense described in former Rule 2-103(D) to mean a person with "a bona fide share in the profits, liabilities and professional responsibilities" of the firm. See L.A. Opinion Nos. 290, which indicates that a true partnership contemplates "joint and several responsibility,"

and 325. Accordingly, unless the "resident partner" will have joint and several responsibility for all partnership liabilities, it will be necessary to make full disclosure of the fee sharing arrangement to all immigration clients and to obtain their written consent to the arrangement. It will also be necessary to ensure that the total fee charged to an immigration client is not increased as a result of the fee sharing arrangement and does not exceed reasonable compensation for the services performed for the client. Compliance with Rule 2-108(A) will be required, since the proposed arrangement would otherwise violate Rule 2-108(B).

Full disclosure to clients of the arrangement with A & B would also be advisable to comply with Rule 2-101. This Rule provides that communications made by or on behalf of a member of the State Bar shall not contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public.

Rule 6-101 requires a member of the California State Bar to act competently in performing legal services for clients. The "resident partner" of A & B who is admitted to practice in California will be held accountable for ensuring that A & B performs its services in a competent manner in compliance with Rule 6-101. We understand that the immigration matters which A & B will handle involve questions of federal law. The

"resident partner" who is admitted in California should be responsible for any advice which is rendered with respect to California laws.

It will not be improper for the "resident partner" to practice under the name "A & B" in immigration matters, since Rule 2-103 was repealed effective April 1, 1979. Rule 2-103(B) formerly provided, with certain exceptions, that a member of the State Bar could not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or any name other than a firm or corporate name containing the name of one or more lawyers in the firm. Rule 2-103(D) formerly provided that a partnership could not be formed or continued among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in listings made clear the jurisdictional limitations of the members and associates of the firm not licensed to practice in all listed jurisdictions. These limitations are no longer applicable. Therefore, our prior Opinions Nos. 230, 290, 295 and 325 are superseded to the extent that they are contrary to this opinion.

It will also be important to take steps to comply with Rule 5-102 and to avoid any potential conflicts of interest. Under ABA Code DR 5-105(D), a lawyer must decline employment or withdraw from employment if a partner, associate or any other lawyer affiliated with him would not be permitted to accept

or continue such employment because of a conflict of interest. Accordingly, the California "resident partner" may not represent any clients, either under the firm name of A & B or his other firm name, if A & B would be precluded from representing such clients.

Our opinion relates solely to the California Rules of Professional Conduct, and we express no opinion regarding the propriety of the proposed arrangement under the ethical rules which are applicable in New York.

This opinion is advisory only. The Committee acts only upon specific questions submitted ex parte and its opinions are based only upon such facts as are set forth in the questions presented.



FORMAL OPINION NO. 386

ATTORNEY AND CLIENT - DUTY TO
DISCLOSE CLIENT PERJURY.

Where an attorney has learned that a former client in a continuing case may have committed perjury, he need not call upon the client to rectify it, and he may not disclose it to the client's present counsel, the court, opposing counsel or the State Bar. The client's present attorney should call upon the client to rectify it, but may not disclose it to the court or opposing counsel.

AUTHORITIES CITED:

California Rules of Professional Conduct No. 7-105

Opinions Nos. 264, 267, 271, 274, 305

California Business & Professions Code § 6068 (West 1974)

California Evidence Code § 956 (West 1974)

Hinds v. State Bar, 19 Cal.2d 87 (1943)

Abbott v. Superior Court, 78 Cal.App.2d 19 (1st Dist. 1947)

People v. Singh, 123 Cal.App. 365 (3d Dist. 1932)

ABA Code of Professional Responsibility,

DR 4-101; DR 7-102; DR 7-105

ABA Canons of Professional Ethics No. 29

ABA Opinions Nos. 23, 202, 216, 268, 287

Oregon Opinion No. 289

M. Friedman, Professional Responsibility of the Criminal Defense

Lawyer: The Three Hardest Questions, 64 Mich. L. Rev.

1469 (1966).

1 The Committee's opinion has been asked in relation to
2 the following facts. Attorney Y substituted in to represent
3 Client C in place of Attorney X in contested litigation. At a
4 later date, X substituted back in to represent C in place of Y.
5 After X substituted back in as C's attorney, Y was approached by
6 a third person, D, who advised him that C had committed perjury
7 in the case and produced documentary evidence to substantiate
8 this allegation. Y examined the purported documentary evidence
9 of perjury, and concluded that the evidence established that C
10 had made serious misrepresentations under oath to the Court. It
11 appeared that the alleged misrepresentations were made while X
12 represented C, X had been advised of this by Z, another
13 of Client C's attorneys, and that X had chosen to disregard Z's
14 unequivocal advice that C had committed perjury. Y did not
15 receive the documentary evidence of perjury from a confidential
16 source or during the period of time when he represented C.

17 In connection with the foregoing facts, the Committee
18 has been asked the following questions.

- 19 1. Should Y call upon either X or C to rectify the
20 alleged perjury?
- 21 2. If Y calls upon X and C to rectify the
22 alleged perjury, and both of them refuse
23 to rectify the alleged perjury, should Y
24 (a) Reveal the alleged perjury to opposing
25 counsel in the litigation?
26 (b) Reveal the alleged perjury to the Court?
27 (c) Report X's conduct to the State Bar?
- 28

- 1 3. Should X call upon C to rectify the alleged
2 perjury?
- 3 4. Should X have called upon C to rectify the alleged
4 perjury at the time that Z advised him of the
5 alleged perjury?
- 6 5. If X calls upon C to rectify the alleged perjury,
7 and C refuses, should X
- 8 (a) Reveal the alleged perjury to opposing
9 counsel in the contested litigation?
- 10 (b) Reveal the alleged perjury to the Court?

11 Although the facts presented do not make it clear, it
12 is assumed in this Opinion that the questions presented are in
13 the context of a civil action, and not in a criminal prosecution.
14 The problems presented by these questions are not without diffi-
15 culty, and present a situation where different interests conflict.

16 It should be made clear at the outset that the facts
17 as stated do not show that Y knows with certainty that C has
18 committed perjury: They only show that he has made serious
19 misrepresentations to the Court, which D has alleged to be
20 perjury. Y's unwillingness to conclude that C in fact has
21 committed perjury is well founded: It is an unusual case where
22 documentary evidence is so persuasive that an attorney should
23 believe it instead of the oral testimony of his client or former
24 client. Y has no duty to investigate whether C has committed
25 perjury.

26 If the information is a client secret, it is subject
27 to California Business and Professions Code § 6068(e), which
28 provides:

1 "It is the duty of an attorney:

2 . . .

3 (e) to maintain inviolate the confidences, and at
4 every peril to himself to preserve the secrets,
5 of his client."

6 Although "confidence" and "secret" are not defined in the statute,
7 they are defined in the analogous provisions of the ABA Code of
8 Professional Responsibility DR 4-101(A), which provides:

9 "'Confidence' refers to information protected by the
10 attorney-client privilege under applicable law, and
11 'secret' refers to other information gained in the
12 professional relationship that the client has requested
13 be held inviolate or the disclosure of which would be
14 embarrassing or would be likely to be detrimental to
15 the client."

16 Section 6068(e) has been rigidly adhered to by
17 California courts, and its command has been given liberal appli-
18 cation. See Opinion No. 274; People v. Singh, 123 Cal.App. 365
19 (3d Dist. 1932). The rule applies even where the facts are
20 already part of the public record or where there are other
21 sources of information. Opinion No. 267.

22 Since disclosure of alleged perjury would clearly be
23 embarrassing to the client, this Committee believes that the
24 information presented to Y is the secret of a former client,
25 and may not be disclosed. See ABA Opinion 23, which held that an
26 attorney should not disclose a fugitive client's hiding place
27 to prosecuting authorities when he learns it from information
28 given to him by his client's relatives.

1 This Committee holds that Y must respect the secret
2 of C, and may not communicate it to X.

3 Competing with the obligation to protect client confi-
4 dences and secrets is an attorney's obligation to rectify any
5 fraud or deception which has been imposed upon the Court or a
6 party. Bus. & Prof. Code § 6068(d); Opinion No. 271; Hinds v.
7 State Bar, 19 Cal.2d 87, 93 (1943) (dictum).

8 Because the attorney-client relationship with C has
9 ended, Y has no duty to call upon C to rectify the alleged
10 perjury. Even the ABA standard in DR 7-102(B), which has not
11 been adopted in California, only requires disclosure of fraud
12 committed "in the course of the representation." Y may call
13 upon C. however, without violating the confidential communi-
14 cation rule.

15 No case has been discovered that has authorized (let
16 alone required) the disclosure of client perjury to opposing
17 counsel under any ethical rules. See Hinds v. State Bar,
18 19 Cal.2d 87 (1943), condemning disclosure of a wife's perjury
19 to her husband in a divorce action. Thus, neither X nor Y
20 should disclose D's information to opposing counsel.

21 Y may not contact the State Bar to institute disci-
22 plinary action against X, because to do so would necessarily
23 involve a disclosure of C's secrets. ABA Formal Opinion 202.

24 X's duties to C are different from Y's, since X is
25 continuing as C's attorney of record. If X believes that C has
26 committed perjury, he should call upon C to rectify it. Both
27 § 6068(d) and California Rule 7-105 require that an attorney
28 "employ only such means as are consistent with truth."

1 Unlike Y, X is subject to the conflicting duties of
2 loyalty to his client and the prevention of fraud on a court.
3 The ABA Code of Professional Responsibility authorizes a lawyer
4 to reveal the intention of his client to commit a crime, DR
5 4-101(C)(3), or the perpetration of a fraud upon a person or a
6 court, DR 7-102(B)(1). Although there is no such provision in
7 California statute or the Rules of Professional Conduct, an
8 exception for the intention to commit a crime has been estab-
9 lished by California case law. Abbott v. Superior Court, 78
10 Cal.App.2d 19, 21 (1st Dist. 1947). Similarly, Evidence Code
11 § 956 provides the following exception to the attorney-client
12 privilege:

13 "There is no privilege under this article if the
14 services of the lawyer were sought or obtained to
15 enable or aid anyone to commit or plan to commit a
16 crime or a fraud."

17 The California exception for a present or future crime
18 is severely limited. Evidence Code § 956 is limited to the
19 narrow circumstance where the attorney is hired for the specific
20 purpose of facilitating the commission of the future crime or
21 fraud. Furthermore, the exception to the § 6068(e) prohibition
22 on disclosure of confidences and secrets does not authorize an
23 attorney to disclose the intention of his client to commit
24 future crimes if he receives such information in confidence in
25 connection with the confession of past crime. Singh, supra.

26 A final limitation on the disclosure of a future crime
27 is that such disclosure is authorized only if it is needed to
28 prevent immediate and serious injury. Opinion No. 264; Opinion

1 No. 274. There is no "misprision of a felony" statute in
2 California.

3 Even if the alleged perjury here at issue is viewed as
4 a continuing crime, this Committee is of the view that it must
5 not be disclosed by X under the crime or fraud exception. Such
6 disclosure would necessarily also involve the disclosure of the
7 past perjury, which should not be disclosed by a lawyer. See
8 Opinion No. 264.

9 The exception to the requirement to preserve client
10 confidences and secrets in the case of an announced intention of
11 a client to commit a crime does not extend in California to the
12 prevention of an intended civil fraud, as opposed to an actual
13 criminal act. An attorney cannot voluntarily extend the scope
14 of the future crime exception to § 6068(e) in the absence of a
15 court decision that it is subject to an exception allowing an
16 attorney to make disclosures to prevent intended civil fraud.
17 Opinion No. 264.

18 Although it appears that California has never adopted a
19 rule similar to DR 7-102(B), or its predecessor, Canon 29 of the
20 Canons of Ethics of the American Bar Association, in Opinion
21 No. 274 this Committee considered the relationship between an
22 attorney's duty under Canon 29 to disclose corrupt or dishonest
23 conduct to a tribunal and an attorney's obligation to respect the
24 confidences of his client, and concluded that the obligation to
25 the client takes priority. A number of this Committee's deci-
26 sions and ABA decisions have similarly given priority, in a
27 variety of circumstances, to the obligation of confidentiality

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1 to the client over the obligation to the tribunal. See Opinion
2 No. 274; ABA Opinions Nos. 216, 268, 287.

3 If X calls upon C to to rectify the perjury and C
4 refuses, X should not disclose the perjury to the Court. The
5 authorities are in conflict as to X's proper course of action.
6 (Although most authorities discuss the conflict addressed herein
7 in the criminal context, the policy considerations apply equally
8 in the civil context). One school of thought holds that X should
9 withdraw from the case, without disclosing the reason to the Court.
10 See, e.g., Opinion No. 305. A second school of thought holds
11 that X should continue his vigorous representation of C as if the
12 perjury had never occurred, on the grounds that to do less would
13 violate the attorney-client privilege and the attorney's role in
14 the adversary system of justice. See e.g., Oregon Opinion No.
15 289; M. Friedman, Professional Responsibility of the Criminal
16 Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev.
17 1469, 1475-1478 (1966). This Committee favors the first course
18 of conduct for X in this case, provided that prejudice to C is
19 avoidable, and that X takes reasonable steps to avoid any prej-
20 udice to C.

21 Both schools of thought agree that X should not
22 disclose the perjury to the Court. See ABA Opinion 268. Although
23 there are dicta in Hinds, supra, 19 Cal.2d at 93, requiring such
24 disclosure, they are pure dicta, and are disapproved by this
25 Committee.

26 This opinion is advisory only. The Committee acts
27 only on special questions submitted ex parte, and its opinions
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1 are based only on such facts as are set forth in the question
2 presented.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 388

April 14, 1981

CLIENT'S TRUST FUND ACCOUNTS-PLACEMENT INTO INTEREST-BEARING CHECKING ACCOUNTS-ENTITLEMENT TO INTEREST FROM ACCOUNTS-DUTY TO DEPOSIT IN INTEREST-BEARING ACCOUNTS.

It is unethical for an attorney to keep or use interest from client's trust fund accounts. Whether an attorney must put such funds into interest-bearing accounts is determined applying a standard of a prudent person of ordinary judgment.

AUTHORITIES CITED:

RULE 8-101

Blackmon v. Hale, 1 Cal. 3d 548 (1970)

Cal. Civil Code § 2229

ABA Informal Decision # 545

ABA Canon 11

ABA Informal Opinion #991

Cal. Civil Code §§ 2261, 2262

Higgins v. City of Santa Monica,

62 Cal. 2d 24, 29-30 (1964)

Cal. Civil Code § 3510

Estate of Smith, 112 Cal. App. 680, 685 (1931)

Estate of McSweeney, 123 Cal. App. 2d 787, 793 (1954)

Estate of Gerber, 73 Cal. App. 3d 96, 110 (1977)

Cal. Probate Code § 920.3

An attorney asks the Committee its opinion on the following facts:

Beginning in January, 1981, banks and savings and loans were authorized to offer interest-bearing checking accounts. A number of issues regarding attorneys' client trust accounts are raised by this new possibility.

Specifically, the attorney asks:

1. May an attorney put a client's funds into this kind of account?
2. If so, who is entitled to the interest on these funds?
3. If the attorney is entitled to the interest, must the client be notified?
4. What duty does an attorney have to invest funds held for a long period of time?

Rule 8-101 of the Rules of Professional Conduct reads in pertinent part as follows:

(A) All funds received or held for the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Accounts", "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client's business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein, and the portion belonging to the member of the State Bar or firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

To say that these accounts are trust accounts answers most of the questions. If these funds are held in trust for the client, then the attorney is a trustee of the funds and is held to the rules governing other sorts of trusts.

The courts look to general trust law to decide cases involving client trust accounts. For instance, in Blackmon v. Hale, 1 Cal. 3d 548 (1970), the court applied general trust law in finding a co-trustee and former law partner to be liable for the misappropriation of the other partner, even after the partnership had dissolved. The fact that the funds had been deposited into an account listing both partners as co-trustees meant that the partner remained a co-trustee of those funds even after he was no longer associated with his former partner.

Trust law clearly provides that a trustee cannot use trust property for his own profit.

California Civil Code "§ 2229 USE OF PROPERTY. Trustee not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

An attorney, therefore, who puts his or her client's funds into an interest-bearing account cannot keep the interest generated by the funds. Any interest generated would belong to the clients.

The ABA addressed this issue in 1962 in Informal Decision #545. The ABA found that the practice of attorneys keeping the interest earned on their clients' trust accounts to be a violation of Canon 11, which prohibits commingling and is essentially similar to Rule 8-101.

It is the opinion of this Committee that a lawyer who received money in his capacity as a lawyer, under circumstances that required him to account to another for such money, would be acting in violation of Canon 11 should he place the money in an interest-bearing account and keep for his own use the interest earned on such account, unless he was specifically authorized to keep the interest for his own use.

The ABA again addressed a similar issue in 1967 in Informal Opinion #991. In this instance, attorneys wanted to use interest generated by an agency account to defray the cost of operating such account. In this case, the ABA found Canon 11 and the Informal Decision to be dispositive.

It (Canon 11) means exactly what it says. It cannot permit of argument that for the lawyer to invest trust funds in his possession, whether such investment is in a savings account, a bond or other security, and to retain the income earned for the purpose of defraying his operating expenses is using the trust funds in direct violation of the Canon.

It has been pointed out that when many clients' funds are in one account, the costs of apportioning the interest to each client would be prohibitive. In such a case, it would obviously be best to avoid the problem by putting the funds in a non-interest-bearing account.

The next question presented is whether an attorney has a duty to invest funds in his or her care. It is true that generally a trustee has a duty to invest funds (Cal. Civil Code §§ 2261 and 2262).

An exception to the general rule is enunciated in Higgins v. City of Santa Monica, 62 Cal. 2d 24, 29-30 (1964). Although this case did not deal with investment of funds, the court did address the question of the duty of a trustee to make the trust corpus (including money) produce income.

"Obviously, that is a rule designed for trusts intended to be productive of income or other gain. The reason for it is that the trustee's overriding duty is to effectuate the trust purpose. However, the reason for the rule requiring productivity ceases, and accordingly, so does the rule (Cal. Civil Code § 3510), in the case of a trust not designed for an income or monetary purpose but for other purposes, such as holding and preservation of property for use by others.

Even in the case of money, where it is ordinarily a trustee's duty to make it productive by investing it, he is not under such a duty if the purpose of the trust was not investment or productivity but only safeguarding. (Allin v. Williams, 97 Cal. 403, 409 (32P. 411); 2 Scott on Trusts (2d ed. 1956) § 181, p. 1349; Bogert, Trusts and Trustees (2d ed. 1960) § 611)."

Thus, whether or not there exists a duty to invest turns on the purpose of the trust. The purpose of clients' trust accounts is to safeguard funds advanced by clients for use by their attorneys. These trusts are not created so that they can be productive of income.

In this sort of trust, the general rule is that the trustee is under no duty to invest funds. In this respect, attorneys are in a position similar to executors or administrators of decedants' estates. Prior to 1971, executors were under no duty to invest funds. Such investment was permitted (Estate of Smith, 112 Cal. App. 680, 685 (1931)), but was not mandatory (Estate of McSweeney, 123 Cal. App. 2d 787, 793 (1954)).

That still leaves a trustee who is safeguarding funds with a duty to protect the assets he is safeguarding, even though he has no duty to make the funds productive. Such a trustee is held to the following standard of care: "that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." Estate of Gerber, 73 Cal. App. 3d 96, 110 (1977), quoting Estate of Moore, 96 Cal. 522, 525 (1892).

The court in Estate of Smith, *supra*, discussed the circumstances under which it would be prudent for an executor to invest funds in his care.

Where funds are to be in his hands for a very short time or where practically all of the funds will be required for the immediate needs of administration, deposit in a commercial account subject to check is proper. On the other hand, in cases where there is a substantial sum in excess of the immediate requirements, which sum is to be held over a period which will permit the accrual of interest on a savings bank deposit, he should be required to safeguard and protect these funds in a manner most advantageous to the estate and to that end it is proper that he should deposit the funds in a savings account rather than in a non-interest-bearing commercial account.

". . . The time within which the estate may be distributed, the time of the receipt of the funds and the immediate need for funds in order to meet the requirements of administration, are all factors in determining whether it is proper for the executor of a particular estate to deposit funds in a commercial account or a savings account. pp. 685-86.

As one example, in Estate of McSweeney, supra, the court found that failure to deposit funds in an interest-bearing account held for 6 years was not a breach of duty, such as to subject the executors to a surcharge. In view of the much higher inflation rate today and the higher available interest rates, 6 years would likely be an unreasonably long time.

This speculation is borne out by the fact that Cal. Probate Code § 920.3 now requires executors and administrators to show, upon each accounting, that during the period covered by the account he has kept all cash in his possession invested in interest-bearing accounts or investments, except such amounts of cash as are "reasonably necessary for the orderly administration of the estate being administered."

It appears that § 920.3 codifies that would be considered to be prudent action. As such, it may be used as a guideline for other sorts of safeguarded funds.

In the absence of any statutory duty to invest other kinds or monies held for safekeeping, the prudent person standard would apply.

This opinion is advisory only. The Committee acts only upon specific questions submitted ex parte, and its opinions are based only upon such facts as are set forth in the questions presented.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION 389

(May 12, 1981)

ATTORNEY AND CLIENT - CONFIDENTIAL COMMUNICATION - DISCLOSURE. Where an attorney learns of information which contradicts earlier confidential information received during prior employment with a Corporation and which leads the attorney to believe that an innocent person has been wrongly convicted of a serious felony, that attorney may disclose the confidential information if the attorney has received consent to disclose or if the Chairperson, Board of Directors, President, or authorized legal counsel does not unequivocally refuse, in writing, to allow such disclosure after a reasonable time has elapsed from the date the request has been made, or if, at some later date, litigation between the attorney and the Corporation results in the attorney being subjected to false accusation by the corporation respecting the confidential information.

AUTHORITIES CITED:

California Business and Professions Code 6068(e); Rule 7-103; ABA Canon 4; ABA EC 4-6; DR 4-101 (C)(1); DR 4-101(C)(4); Opinions 159, 247, 264, 329; ABA Formal Opinions 19, 202, 250; Com'l Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934; In re Ochse, 38 Cal.2d 230.

Attorney "A", while employed as house counsel for Corporation "B" (an insurance company), was requested to prepare an opinion concerning the possible liability which might result from an incident involving insured Corporation "C". The request was made by a supervisor in Corporation "B". "A" was provided with the following confidential information:

A particular incident was caused by an accident;

An employee of insured Corporation "C" was at fault in causing the accident;

The location where the incident occurred causing the accident was upon the premises of insured Corporation "C";

The accident occurred because of negligence of an employee of Corporation "C" who was then engaged in the course and scope of his employment with Corporation "C";

"A" was not provided the name of Corporation "C".

Sometime after preparing the legal memorandum, "A" terminated his employment with Corporation "B".

Approximately two years after "A" had prepared the legal opinion for Corporation "B", when "A" was no longer associated with "B", "A" learned from reports in the news media that an individual "D" has been charged and convicted of a criminal homicide which occurred as a result of the incident referred to above. Based upon the news information, attorney "A" concludes that "D" was not the negligent employee of "C" since "D" was charged with initiating the incident at a location not on corporate property.

"A" has retained attorney "E" in respect to a lawsuit by "A" against "B" for wrongful discharge from employment. The committee has been told to assume that the above-related incident is not a subject of controversy in the lawsuit.

"A", through his attorney "E", has contacted chief local outside counsel of "B", has provided that counsel with the name of the supervisor in "B", and has requested that "A" be allowed to disclose to the prosecutor and/or defense in the

criminal matter the confidential information "A" received while employed with Corporation "B". Chief local outside counsel has reported back to "E" that the named supervisor states that he knows nothing about the request for a legal opinion made to "A" while "A" was employed by "B". Chief local outside counsel tells "E" that Corporation "B" will not allow disclosure until such time as "A" gives Corporation "B" the name of the insured Company "C". Since "A" does not know this information, both "A" and "E" believe that persons in Corporation "B" are willfully preventing "A" from disclosing the confidential information due to possible civil liability that could accrue to "B" should the confidential information be made public.

INQUIRY

Can "A" disclose the confidential information learned during his employment with Corporation "B" to the prosecution and/or defense in the above-stated criminal matter? Both "A" and "E" believe that an innocent man may have been wrongly convicted of a serious felony.

DISCUSSION

Two secondary ethical considerations may be quickly resolved:

(1) An attorney must maintain inviolate the confidence of his or her client. (California Business and Professions Code § 6063(e); ABA Code of Professional Responsibility Canon 4.) This duty outlasts the lawyer's employment. (Opinions 159, 274, ABA Code of Professional Responsibility EC 4-6.) Only an attorney's client, or ex-client, can release the attorney from the obligation of maintaining confidence (Commercial Standard Title Co. v.

Superior Court (1979) 92 Cal.App.3d 934, 945), and only then after full disclosure to that client or ex-client. (ABA Code of Professional Responsibility DR 4-101 (C)(1).) The information received during "A's" employment with "B" is confidential.

(2) An attorney is precluded from communicating directly or indirectly with a party whom he or she knows to be represented by counsel only when the matter to be discussed is a subject of controversy. (California Rules of Professional Conduct Rule 7-103.) Since it is given that the confidential communication is not of controversy in the lawsuit, "A" or "E" may communicate directly with the officers or directors of "B" in respect to the issue raised herein and need not first obtain consent for such communication from "B's" legal counsel. (Id.)

The primary ethical consideration raised by this inquiry is the proper course of conduct for "A" and/or "E" to take in light of the competing interests of encouraging confidence and preserving inviolate the attorney-client relationship as applied in the abstract (In re Ochse, 38 Cal.2d 230, 231), and rectifying what may be a serious miscarriage of criminal justice in this specific instance. The committee is of the opinion that "A" and/or "E" may ethically proceed in the following manner:

Identical letters, or other written communications, denoted "Personal" should be directed to the Chairperson of the Board of Directors, President, and Chief Legal Counsel of Corporation "B". Those written communications must set forth fully and completely the facts of the pending lawsuit between "A" and "B", the confidential information received by the named supervisor during "A's" employment

with "B", the circumstances of the assignment, the legal memorandum prepared by "A" if still in his possession, the later information from the media and its source which leads "A" to believe in "D's" innocence, and the attempts and result of contacting local outside counsel in order to obtain consent to release the confidential information. The written communication should include the request that a written response of the Chairperson of the Board of Directors, President, or Chief Legal Counsel (indicating express authorization from the President or Board of Directors) unconditionally allow, or refuse to authorize, release of the confidential information to the prosecution and defense. The communication should state that if "A" does not receive an unconditional written response from either the Chairperson, President, or Chief Legal Counsel (indicating express authority from the President or Board of Directors) either authorizing or denying release of the confidential information by a given date, "A" will consider that he is authorized to release the confidential information due to the nature of possible miscarriage of justice involved. The Chairperson, President, and Chief Legal Counsel should be given a reasonable period to reply to the written request such as 60 days from the date of mailing of the written requests. (See Opinion 353; ABA Formal Opinion 202.)

If the written reply of the Chairperson, President, or Chief Legal Counsel unconditionally refuses to allow the release of the confidential information, then "A" and "E" may not then disclose that information. (California Business and Professions Code section 6068(e); ABA Code of Professional Responsibility,

Canon 4.) Any other response, or failure to respond, should be deemed as authorizing disclosure in light of the possibility of grave harm involved. (See Opinions 264, 353.)

Should the issue of the confidential information later become a subject in controversy of the lawsuit between "A" and "B", then disclosure of the information would be authorized to the extent necessary for "A" to defend himself with respect to any false allegations made therein. (ABA Formal Opinions 19, 202, 250; ABA Code of Professional Responsibility DR 4-101(C)(4): cf. Opinions 159, 329.)

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

CORRECTED OPINION

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 390

(May 12, 1981)

ATTORNEY - CLIENT - DUTY TO ADVISE OF PRIOR ATTORNEY'S MALPRACTICE. It is neither required nor prohibited that an attorney advise a client concerning a malpractice action against another attorney previously handling the same matter. Where the present attorney is appellate counsel and cannot accept employment in a malpractice action, the rationale discouraging advising a layperson of possible legal action does not pertain.

AUTHORITIES CITED:
LA Opinion 313, 326
ABA EC 2-3

The Office of the State Public Defender has inquired whether they have an obligation to inform a client of the client's right to a malpractice suit when the appellate attorney raises the issue of trial counsel incompetence in an appeal.

In LA Opinion 313, this Committee considered the ethical duty of an attorney for a corporation to report to the board of directors that the actions of a prior attorney were inadequate to the responsibilities entrusted to that attorney in connection with a stock purchase. In finding that the position of trust between the present attorney and client creates an affirmative duty to make the report, the Committee went on to caution that the report should: (1) not recommend the commencement of a malpractice suit, nor (2) should the reporting attorney accept employment for the possible malpractice action nor recommend another attorney for such employment. These limitations were designed to adhere to former rules of professional conduct which prohibited volunteering legal advice and advertising for the purpose of securing employment as attorney.

In LA Opinion No. 326 this Committee held that there is no duty to inform a person not in some fiduciary relationship with an attorney that they may have a legal action for damages. At the same time, an attorney does have a duty to represent a client zealously. Under the facts of that opinion, where a suit was already instituted and involved the claims of third parties, this Committee believed that the policy against stirring up litigation did not make it improper for an attorney to investigate facts and request third persons to ascertain their claims by lawsuit if that would promote the client's interest. Again, however, the attorney was cautioned to not accept employment by the third party, and only to suggest to that party that they seek independent counsel.

The restraints on attorney advertising have undergone revision since these earlier opinions. Further, under the facts of this inquiry, it would appear that there is no solicitation of professional employment on the part of the State Public Defender.

The prohibition against stirring up litigation is rooted in the common law concerns of barratry, champerty, and maintenance. The vice of each of these was the pecuniary gain that could inure to the attorney who might seek or encourage litigation. On the other hand, EC 2-3 of the American Bar Association's Code of Professional Responsibility recognizes, as an aspirational guideline, that "(t)he giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems." The ethical consideration further advises that the giving of advice is particularly appropriate to one who is uninformed concerning their legal rights or obligations.

It would appear to this Committee that the Office of the State Public Defender does not receive pecuniary gain, nor could any

other personal benefit be foreseen, in the giving of advice to a client represented on appeal concerning a malpractice action against trial counsel. Clients of the State Public Defender are perhaps those very persons who may be uninformed of their legal rights. For those reasons, this Committee believes that concerns which would restrain an attorney from advising a client of a potential malpractice action have no application under the facts of this inquiry. Consistent with our earlier opinions, an attorney, including attorneys of the State Public Defender's Office, should advise not on the merits of the potential malpractice action but instead, that the client should seek independent counsel.

The determination of when to advise the client must be based on considerations of law, rather than ethics, such as the governing statute of limitations. Once the appellate attorney determines that the client should be advised of a possible malpractice claim, the advisement should be promptly made in order to give the client a meaningful opportunity for further action.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 391

September 3, 1981

ATTORNEY AND CLIENT -- BILLING FOR SERVICES OF LAW CLERKS, LEGAL ASSISTANTS (PARALEGALS) AND SECRETARIES. A law firm may properly bill a client for professional services of a law clerk or legal assistant, provided that an itemized billing separately identifies such services. Secretarial services may not be billed as attorney time, and an associate may not be discharged for refusal to approve such a billing.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rule 2-107(a); ABA Code of Professional Responsibility, DR 2-106(a); ABA Informal Opinion No. 1333; California Business and Professions Code Sec. 6125, Sec. 6126(b); California Civil Code Sec. 1709, Sec. 1710. In re Lamerdin's Estate, 261 App. Div. 914, 25 N.Y.S.2d 334 (1941); Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980).

Our opinion has been requested in connection with the following facts. A law firm has specific agreements with its clients for the hourly reimbursement for legal services by the firm's attorneys and for the payment of disbursements. There is no provision in the agreements regarding work performed by non-attorney office staff. We have been asked our opinion on whether billing such non-attorney time at the attorney's contractual rate without identifying it as non-attorney time is a violation of the California Rules of Professional Conduct. We have been further asked whether it is a separate

violation of the Rules of Professional Conduct to terminate an associate attorney for refusing to approve such a billing. In a related inquiry, we have been asked whether there are any guidelines regarding the amount to be billed or the kind of services which may be billed for law clerks and legal assistants (paralegals).

These inquiries are governed by Rule 2-107(a) of the California Rules of Professional Conduct, which provides:

"A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee."

Cf. ABA Code of Professional Responsibility, DR 2-106(a).

Normally law clerk and legal assistant services should be billed at an appropriate rate lower than the rate for legal services by an attorney. We are aware of no more specific guidelines for the billing of such services.

The billing of secretarial services (or law clerk or paralegal services) as attorney time is a violation of Rule 2-107(a), in the opinion of this Committee, because it fraudulently misrepresents to the client that legal services have been rendered by an attorney.

Similarly, the discharge of an associate for refusing to approve such a billing is also in violation of Rule 2-107(a), because it makes the charging of an illegal fee and the participation in fraudulent conduct a condition of his continued employment. Such a condition is prohibited by Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980), which holds that an employee may bring an action against his employer where he is discharged for refusing to engage in illegal conduct at his employer's request.

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and its opinions are based only on such facts as are set forth in the question presented.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 392

(October 20, 1981)

AFFILIATION WITH OUT OF STATE LAW FIRM - REPRESENTING ADVERSE INTERESTS - IMPUTED DISQUALIFICATION. There is no ethical impropriety in the affiliation of a California law firm with a law firm in another state, the statement of such affiliation on the letterhead of the firm, or payment for services rendered by the out of state firm under the circumstances described. The two firms are, however, deemed to be a single firm insofar as the representation of adverse and conflicting interests are concerned.

AUTHORITIES CITED:

California Rules of Professional Conduct 2-101, 2-101(2), 2-108, 4-101, 5-102(B). ABA Code of Professional Responsibility DR 2-102(D), 5-105(D). L.A. Opinions Nos. 325, 353, 385. Chambers v. Superior Court, 175 CR 575, 578 (1981).

A Los Angeles law firm, A, B & C, is contemplating affiliation with a Washington, D.C. law firm, D, E & F, and requests this Committee's opinion as to the ethical propriety of the proposed affiliation and whether it would result in an attribution of each firm's clients to the other firm, thus creating potential conflict of interest problems.

The affiliation would be basically a forwarding arrangement with mutual accommodation in the use of office facilities and services. In rendering legal services to their respective clients on specifically referred matters each firm would have available the services of the members, associates and employees of the other firm. The inquiry states that as a general rule

the firm utilizing the services of the other would be billed at the regular rates charged by the firm rendering the service. The client for whom the services were requested would in turn be billed by the referring firm. The relationship would be referenced as follows:

A, B & C would state on its letterhead and in law lists "Affiliated with D, E & F, An Independent Law Firm in Washington, D.C."; and D, E & F would similarly state on its letterhead "Affiliated with A, B & C, An Independent Law Firm in Los Angeles, California"

A, B & C intends shortly to establish a branch office in Washington in space leased from D, E & F. The office will be staffed by an A, B & C partner licensed to practice law in the District of Columbia who would serve as primary liaison with the D, E & F firm which has no plans at this time for opening a Los Angeles office, although that could occur in the future.

The letter of inquiry states that both firms would strictly adhere to a policy that any matter forwarded would be precisely described and confidential information would be carefully limited to only the specific matter forwarded. The forwarding of any matter and all aspects of the arrangement between the firms relating to the forwarded matter would be fully disclosed to the client.

The California Rules of Professional Conduct do not include any provision relating to an affiliation of California lawyers with those from out of the state. The ABA Code of Professional Responsibility in DR 2-102(D) provides that a partnership shall not be formed between lawyers

licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates not licensed to practice in all listed jurisdictions. The opinions of this Committee have repeatedly affirmed the ethical propriety of partnerships between lawyers who are not all admitted to practice in California (See L.A. Opinions Nos. 325 and 385). If the lawyers of A, B & C could ethically form a partnership with out of state lawyers, it seems clear that a relationship not amounting to a partnership could properly be formed so long as the jurisdictional limitations on the lawyers involved are expressly set out as they would be under the contemplated manner of reference.

Rule 2-101 of the California Rules of Professional Conduct regulates the kind of information that can ethically be given about the availability for professional employment of a California lawyer or law firm. It provides that a communication by or on behalf of a member of the State Bar shall not contain any matter in a manner or format which is deceptive or tends to confuse, deceive, or mislead the public. Rule 2-101(2). This Committee fails to perceive any deceptive, confusing or misleading statement in the manner in which the arrangement between A, B & C and D, E & F is proposed to be referenced, i.e., each being said to be "affiliated" with the other and each being described as an independent law firm. The reference clearly negates a partnership.

California Rule 2-108 limits the division of fees by a California lawyer with another lawyer not a partner or

associate to cases where the client consents in writing to the division of fees and where the total fee is not increased solely by reason of the division of fees between the lawyers. Partner, in this connection has been taken to mean one with a bona fide share in the profits, liabilities and professional responsibilities of a firm (L.A. Opinion No. 385) and that relationship is clearly not intended by the proposed affiliation. However, the financial arrangement contemplated by the two affiliated firms does not appear to be a division of fees; rather services performed by the A, B & C firm will be charged to the D, E & F firm as if D, E & F were itself the client. Were it otherwise interpreted, the intended disclosure to the client that such services are being obtained from D, E & F together with his consent would obviate any problem that might arise in this connection.

The most serious problem that we perceive in the proposed arrangement between the two firms relates to conflicts of interest intended to be regulated by California Rules 5-102(B) and 4-101.

Rule 5-102(B) forbids a lawyer to represent conflicting interests without the written consent of all parties concerned. Rule 4-101 forbids a lawyer to accept employment adverse to a client or a former client without his informed and written consent if the employment relates to a matter in reference to which the lawyer has obtained confidential information by reason of or in the course of his employment by that client or former client. ABA Code of Professional Responsibility DR 5-105(D) provides that if a lawyer is required to decline employment under a disciplinary rule no lawyer "affiliated" with him or his firm may accept such

employment. Although California has no rule like DR 5-105(D) and the ABA Code is not binding on California lawyers, that Code has long been looked to by this Committee for guidance, and it serves to guide California courts in related matters (See Chambers v. Superior Court, 175 Cal Rptr 575, 578 (1981)).

Literally DR 5-105(D) in terms applies to the proposed association of A, B & C with D, E & F. Furthermore, it is the opinion of a majority of the Committee that the permanence and closeness of the contemplated relationship between these firms requires that the two be considered a single law firm insofar as concerns the representation of conflicting and adverse interests. It follows that ethically A, B & C may not represent a client asserting a claim adverse to a client concurrently represented by its Washington affiliate unless written consent of all parties is obtained. Similarly in any adversary matter substantially related to that in which D, E & F formerly represented a client, A, B & C would presumably be disqualified.

The Committee has here addressed only such perceived ethical problems as affect the Los Angeles firm A, B & C. We express no opinion as to the ethical rules that govern lawyers in the District of Columbia.

The Committee acts only with reference to specific questions submitted ex parte and its opinion, which is advisory only, is based on such facts as are set forth in the question submitted.

393

sent a client with interests adverse to his unless he had a reason to believe that D, E & F would be retained by A, B & C to represent his interests. We do not believe that, without more, the statement that the firms are "affiliated" yet "independent" provides such a reason. Indeed, given the two firm's distinct geographic locations, it would seem unreasonable for a client to assume that the "affiliated" firm would have any connection with his affairs unless they involved the distinct locale or practice specialty unique to that firm.⁴

The Committee acts only with reference to specific questions submitted ex parte and its opinion, which is advisory only, is based on such facts as are set forth in the question submitted.

1. Prior to the 1975 amendments to the California Rules Rule 1 thereof provided in part:

"The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. In that connection the Code of Professional Responsibility of the American Bar Association should be noted by members of the State Bar."

Effective with the January 1, 1975 Amendments, the quoted provision was deleted and has not been reinserted despite numerous subsequent amendments to the rules. We must assume that the absence of language referring to the ABA Code is intentional and we conclude that the ABA Code is not a proper guideline in instances where the California Rules or Interpretive authorities address the topic. We are aware of the references to ABA Disciplinary Rules 5-105(D) in *Chambers v. Superior Court*, 121 C.A.3d 893, 175 Cal. Rptr. 575 (1981), and *Chadwick v. Superior Court*, 106 C.A.3d 108, 164 Cal. Rptr. 864 (1980), both of which were decided after the 1975 Amendment To Rule 1. However, neither case seems to have been aware of the amendment. In any event, although each dealt with imputed disqualification of former government lawyers and thus is inapt here, had their analysis been applied to private lawyers the result would have been the same under the ABA "affiliated" test or our "in the firm" test.

2. Subsequently, in dicta in a situation involving a "resident partnership" arrangement, we referred to attribution and used the ABA Code's formulation "partner, associate or any other lawyer affiliated with him." (DR 5-105(d).) That reference to the ABA Code's expansive formulation was unnecessary and is disapproved. We believe that "in his firm" necessarily includes partners and associates. We recognize that certain other descriptions may be appropriate for various relationships among lawyers. Examples are "of counsel," "research attorney" and "legal assistant." Doubtless there are others. We believe that the question whether the rule of attribution is applicable to such relationships is dependent upon the actual facts of the relationship and the perception of clients and the public with respect to it.

3. Interestingly, the D.C. Code initially rejected the ABA's "partner, associate, or . . . person affiliated" standard and applied only to a "partner or associate." Subsequently the D.C. Code was amended to read the same as the ABA Code. Then, in 1981 the D.C. Code was again amended. In its present form it retains the ABA's "partner, associate, or . . . person affiliated" language, but exempts certain categories of conduct from the application of the attribution rule.

4. Nonetheless, to minimize the possibility of any confusion, we believe that the description of the relationship should be qualified and we suggest language similar to: "affiliated in certain matters with . . . an independent firm" or "Correspondent firm: . . . an independent firm."

Opinion No. 393 (October 20, 1981)

CONFLICT OF INTEREST — POWER OF ATTORNEY TO SETTLE — CONTINGENCY FEE RETAINER AGREEMENT. It is improper for an attorney routinely to request a power of attorney to settle cases in a retainer agreement. That the power of attorney is executed in conjunction with a contingency fee arrangement compounds the impropriety.

Authorities Cited:

California Rules of Professional Conduct 5-101.
ABA Code of Professional Responsibility EC7-7,

EC7-8, DR5-103, DR9-101. *Bice vs. Stevens*, 160 Cal.App.2d 222; 325 P.2d 244 (1958).

Our opinion has been requested with respect to the propriety of a retainer agreement for a contingency fee which contains a power of attorney to settle the case and to disburse the proceeds. The power of attorney referred to read as follows:

"ATTORNEY IS HEREBY GIVEN POWER OF ATTORNEY to execute any necessary dismissals, releases, checks or drafts on my behalf and to deposit funds into the client trust account and to disburse the proceeds pursuant to this agreement.

"It is further understood that if the client becomes unavailable for any reason during the conduct of client's case, and the attorney, in his best judgment, feels the client's case would be best served by settlement of said case, the attorney may, after reasonable efforts to contact the client, affix client's signature to releases and settlement drafts thereby settling client's claim as his attorney in fact and distributing sums accordingly, holding thereafter client's share in attorney's client's trust account. 'Reasonable efforts' for purposes of this paragraph are defined as sending registered letters to client at both his last known address and in care of client's closest relative (or friend), which name and address was supplied by client at the time of the initial interview."

Rule 5-105 of the California Rules of Professional Conduct states:

"A member of the State Bar shall promptly communicate to the member's client all amounts, terms and conditions of any written offer of settlement made by or on behalf of an opposing party . . ."

The terms of the agreement permit violation of this rule.

Further, ABA Code of Professional Responsibility EC7-7 provides:

"In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer . . ."

EC7-8 provides:

"A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself . . ."

While an attorney may ask for the power to settle a case, after fully informing his client on the state of the facts and issues, an attorney may not request a waiver of the decision-making right of the client.

In California, there is an issue as to whether a settlement signed by an attorney in such circumstances would be valid. As stated in *Bice vs.*

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 394

(April 1, 1982)

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TRIAL COUNSEL'S DUTY TO ADVISE THE COURT OF A VIOLATION OF A COURT ORDER. No ethical rule requires trial counsel to inform the court of a possible violation of a court order by a third party with which the attorney's client may be involved.

AUTHORITIES CITED:

California Rules of Professional Conduct 2-111(B)(2), 2-111(C)(1)(d) and (e), and 7-105; Business and Professions Code Sec. 6068(d) and (e); Evidence Code Sec. 956; American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579, 595-96 (1974).

Attorneys A, B, and C jointly represented plaintiffs X, Y, and Z in a lawsuit against City Q. Attorneys A and B were members of a law firm who simultaneously represent the defendant in various matters. On motion by the city, all three of plaintiffs' attorneys were disqualified under a court order which stated, among other things:

"Motion of (City Q) to disqualify (attorneys A, B, and C) is granted; said counsel being ordered not to participate further in any manner in these proceedings, either formally as attorneys of record, or as informal advisors. . . . (Attorney C) may take all action

necessary to minimize damage to his clients herein, including an orderly transition of the case to new counsel. . . ."

Since entry of this order, the following has occurred:

- a. Attorney C has begun to live at least two days a week with party X in a single family home.
- b. Attorney C has loaned party X \$500 for expenses of the litigation. Party X gave this money to her new counsel who is holding it in his client's trust account, and party X later advised him of the origin of the funds.
- c. During the telephone discussion between party X and her new counsel concerning the living arrangements of X and C, new counsel heard C yell to X: "Don't talk to him (apparently referring to the new counsel); tell him you'll get back to him."

On the basis of these facts, new counsel asks the following questions:

- (1) Has attorney C violated the court order?
- (2) Assuming there has been a violation of the court order, does new counsel have an affirmative duty to inform the court or the state bar?
- (3) What is the proper course of action for new counsel regarding the \$500 he is holding in his client's trust account?

We address these questions in the order in which they are posed.

(1) The issue of whether attorney C has violated the court order is a legal matter for determination by the court. This question does not involve ethical considerations within the authority of the Legal Ethics Committee.

(2) We cannot assume that C has violated the court order. This determination involves a host of facts which have not been presented and which may not be known to the new counsel.

In any event, however, Business and Professions Code Sec. 6068 states, in part: "It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client. . . ." Here the information in question was obtained by the attorney from the client and in the course of rendering professional services; and accordingly the attorney cannot properly disclose the information.*

(3) We do not find that any special course of action is required with regard to the \$500 held by new counsel in his client's trust account. Whatever ethical impropriety attorney C may have engaged in with his continuing involvement in the litigation, if any, does not affect the party's right to pursue the litigation or to use the funds she has borrowed for that purpose. Future events may imperil current counsel with regard to his duties to the Court, but we do not perceive that situation to now exist. See Business and Professions Code Sec. 6068 (d) and Rules of Professional Conduct 7-105, 2-111(b)(2), and 2-111(C)(1)(d) and (e).

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

* The exceptions to the rule of confidentiality, with regard to representation sought to assist in crimes or frauds, are not involved here. See American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579, 595-96 (1974); Evidence Code Sec. 956.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 395

(April 1, 1982)

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ATTORNEY-CLIENT -- CONFLICT OF INTEREST -- DUTY TO WITHDRAW. An attorney may not represent two clients with potentially adverse interests unless there has been full disclosure of the adverse representation and the clients have consented to the representation in writing. An attorney cannot represent two clients with actually conflicting interests in related matters despite the clients' consent to the joint representation and must withdraw from representation of both clients.

AUTHORITIES CITED:

Rule 4-101

5-102

Trone v. Smith, 621 F.2d

994 (9th Cir. 1980).

Valley Title Co. v. Superior

Court, 124 Cal. App. 3d

857, 177 Cal. Rptr. 643

(1981)

Jeffrey v. Pounds, 67 Cal. App.

3d 6, 136 Cal. Rptr. 373

(1977)

Klemm v. Superior Court, 75

Cal. App. 3d 893, 142

Cal. Rptr. 509 (1977)

Comment, Legal Representation

of Conflicting Interests:

A View Towards Better Self-

Regulation, 18 SANTA CLARA

L. REV. 997 (1978)

An attorney has inquired about the propriety of representation involving the following facts:

CASE NO. 1

1. A and B are each sued as defendants in a personal injury action. A, while operating a truck, allegedly rear-ended plaintiffs while acting in the course and scope of his employment with B. B has admitted in discovery that A was acting in the course and scope of his employment with B at the time of the accident.
2. Requests for admissions and interrogatories have been propounded upon A with respect to determining the true identity of A's employer at the time of the accident. There has of yet been no response. A advises that he believes he was not employed by B.
3. Defense counsel for A and B recently admitted that before his involvement in the case, a verified answer was filed by another firm on behalf of A admitting A was employed by B.
4. A and B are being represented by the same counsel, as are the interests of B as a limited self-insured and the interests of B's excess insurers.

CASE NO. 2

1. After the accident involved in Case No. 1, A has incurred major personal injuries, including brain damage, while operating the same defectively designed and maintained truck, allegedly in the course and scope of his employment and files suit against B and eight other entities whose relationships to B, if any, are presently unclear.
2. Four of the defendants in Case No. 2 filed a motion for summary judgment alleging A was an employee of each of said entities and based upon the affirmative defense of the exclusive remedy of Workers' Compensation. The motion was denied as no less than five different entities claim to be A's em-

ployer. In addition, allegations that defendants were functioning in a "dual capacity" are embodied within the complaint of Case No. 2.

3. Triable issues of fact remain as to the true identity of A's employer, the capacities and involvement of each of the defendants and whether A's employer was acting in a dual capacity from which liability will issue.
4. The issue of the ultimate identity of A's employer overlaps into both Case No. 1 and Case No. 2 and is a crucial issue in Case No. 2.
5. The inquiring attorney currently does not know if the same Corporate Risk Manager for limited self-insured B is administering both Case No. 1 and Case No. 2 and if that person is also administering both cases on behalf of the interests of A, B and the interests of the eight other entities named as defendants in Case No. 2, as well as their insurers.
6. The inquiring attorney's office represents A in Case No. 2.
7. The attorney has inquired as to the propriety of the representation of both A and B in Case No. 1 by the same individual acting on behalf of limited self-insured B in Case No. 2.

The following observations and conclusions of the Committee are made with respect to, and are limited to the facts of this inquiry only.

1. The lawyer representing both A and B in Case No. 1 has a conflict of interest.

At issue in this situation is the question whether the attorney for both A and B in Case No. 1 may be involved in a conflict of interest requiring his or her disqualification from representation of either A or B in the first lawsuit. The issue involves the interplay of Rule of Professional Conduct 4-101,

which deals with the confidential relationship between an attorney and client, with Rule 5-102, prohibiting attorneys from engaging in representation of adverse interests. Here, because of the interrelated fact situations of the two lawsuits, the attorney for A and B is faced with representing clients that do indeed have adverse interests. In fact, it is the opinion of the Committee that there may be a conflict arising from the representation of both A and B in Case No. 1 alone. In that suit, the issue determining A's ultimate liability for any injuries suffered by the plaintiffs is whether he was acting in the course of his employment at the time of the accident. If A was acting in that capacity, then B is liable for A's actions through the common-law doctrine of respondeat superior. However, if A was functioning outside that scope, then he alone should be liable for any damages. Because the ultimate outcome of the case may revolve upon the determination of this issue, the parties have adverse interests. Also, because it appears that this issue will be litigated, the now-potential conflict may soon become an actual conflict, requiring attorney withdrawal at that time, perhaps to the detriment of either or both parties who would then be compelled to hire new counsel.

Representation of B during the course of Case No. 2 by the attorney for both A and B in Case No. 1 only compounds the potentiality of a conflict of interest. In Case No. 2, as outlined above, a crucial issue is whether A was acting within the scope of his employment at the time he sustained his injuries. Also involved is the question of just who his employer was. During his or her representation of A in Case No. 1, the attor-

ney may be privy to confidences of A concerning his opinion regarding his employment at the time his truck hit the plaintiffs. This information may be useful to the attorney during the course of his or her representation of B in Lawsuit No. 2, where he or she may attempt to prove or disprove that B was acting as A's employer. Further, if the attorney also simultaneously represents the other eight named defendants, he or she will be privy to confidential information from each of them concerning their relationship to A and be able to use that information against all the other defendants in the case. Like the situation in Case No. 1, what is now an apparent conflict of interest may soon ripen into an actual conflict because the issue of A's employment is so crucial to the eventual resolution of the dispute. Also, as with Case No. 1, the attorney would then be required to withdraw from participation in Case No. 2 to the possible detriment of all the parties involved.

2. The lawyer representing both A and B in Case No. 1 should withdraw from representation of either party.

The two Rules of Professional Conduct which are involved in this particular case are Rules 4-101 and 5-102. Rule 4-101 prohibits an attorney from violating the confidences of his or her client. It reads:

A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

Rule 5-102 is also designed to protect the confidentiality of the attorney-client relationship and was promulgated to cover those

situations where the attorney is actually representing an individual in continuing or pending adversary proceedings.

(A) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.

(B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

Here, as discussed above, the attorney for both A and B is representing potentially conflicting interests which in all probability will ripen into actual conflicts to be litigated in court. As also mentioned earlier, the attorney is in the position of hearing confidences from either client that might be used against the other regarding the issue of employment in both Case No. 1 and Case No. 2. Under the mandate of Rule 5-102, then, the attorney must not represent both of these interests at the same time without the clients' written consent. Nor may he or she represent one with an interest adverse to the other relating to the issues in these cases in a later proceeding if both clients have not given their consent to such representation in writing.

The courts have enumerated three major reasons why representation of clients with potentially differing interests -- even when those differences do not ripen into actual disputes -- is improper. The first reason given by the courts is that such a situation will place an attorney in the position of having information from one client that he or she may use to the detriment of the other's interests in violation of Rule 4-101. It

does not matter that no such confidences were ever actually disclosed:

"The interest to be preserved by preventing attorneys from accepting representation adverse to a former client is the protection and enhancement of the professional relationship in all its dimensions. It is necessary to preserve the value attached to the relationship both by the attorney and by the client. These objectives require a rule that prevents attorneys from accepting representation adverse to a former client if the later case bears a substantial relation to the earlier one. . . . [I]t matters not whether confidences were in fact imparted to the lawyer by the client. The substantial relationship between the two representations is itself sufficient to disqualify. . . . The test does not require the former client to show that actual confidences were disclosed."

Valley Title Co. v. Superior Court, 124 Cal. App. 3d 867, 879, 177 Cal. Rptr. 643, 649-50 (1981), quoting Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980). Here, we have no information indicating that the attorney for both A and B in Case No. 1 has indeed received confidential information from either A or B, but under the policy reason enunciated in the Valley Title case, that is not necessary: we have the probability of the revelation of confidences and that is sufficient to require the attorney to disclose his or her representation of adverse interests and obtain written consent to the continuation of the representation of those interests from both clients.

A second policy reason advanced by the courts discouraging an attorney's handling of interests adverse to a present or former client in substantially related cases is their perception that the attorney will, either consciously or unconsciously, be subject to divided loyalties and compelled to work for one client to the detriment of the other. An attorney has the duty to give

his or her undivided loyalty to clients; representation of adverse interests in that situation prevents the lawyer from fulfilling that duty, "making it improper to assume a position inconsistent with the interests of a present or former client without complete disclosure and the informed consent of all parties involved." Comment, Legal Representation of Conflicting Interests: A View Towards Better Self-Regulation, 18 SANTA CLARA L. REV. 997, 1003 (1978). That very situation will arise here: the attorney representing both A and B will necessarily be required to divide his or her loyalties between the two clients, and any number of factors may cause him or her to represent one at the expense of the other. For instance, the likelihood that one client will be a consistent client rather than a one-time affiliation may cause the attorney to put more effort into the representation of the former; similarly, the attorney's perception that one client is more likely to pay its bills on time may unconsciously influence the lawyer to represent that client more vigorously. Further, this consideration extends to the quality of the attorney-client relationship: if antagonism is present in the relationship between the two clients with adverse interests, the first client may come to doubt his or her attorney's loyalties. The California courts have held that this gives rise to the need for full disclosure to the clients and their written consent to the continued adverse representation. See, Jeffrey v. Pounds, 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373, 376 (1977).

A third reason given by the courts requiring disclosure of conflicts arising from adverse representation of two clients

is the need to preserve the image that the legal profession provides undivided loyalty to its clients. This, according to the court in Valley Title Co. v. Superior Court, is even paramount to the wishes of the parties that the same attorney handle adverse interests: if the parties' interests are actually adverse, "the desire of the parties, or their informed, or uninformed, consent, will be transcended by the paramount 'objective of maintaining public confidence in the impartiality of the courts and integrity of its professional bar' and by 'considerations of ethics which run to the very integrity of our judicial process.'" 124 Cal. App. 3d at 883, 177 Cal. Rptr. at 652 (citations omitted). Once again, that problem is apparent in the case before the Committee: representation of the two adverse interests by the same attorney in these lawsuits may create an image detrimental to the concept of impartial representation for every client, making such representation improper.

A careful reading of Rule 5-102 reveals that an attorney may, according to the language of the rule, represent parties with adverse interests if the attorney has fully disclosed the conflict and obtained the written consent of both parties to the continuing representation. The Rule says nothing indicating that there may be situations in which an attorney may not represent adverse clients despite their consent and desire that he or she do so. However, the courts have held that in such situations such representation is indeed improper despite any consent, and have caused the attorney to be disqualified. According to the court in the Valley Title case,

[W]here . . . there is an actual, present, existing conflict between the parties, any consent to dual adverse representation by an attorney will be held invalid. . . . "Though an informed consent be obtained, no case we have been able to find sanctions dual representation of conflicting interests if that representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another. . . . As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other."

Id. at 882-83, 177 Cal. Rptr. at 652, quoting Klemm v. Superior Court, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509, 512 (1977) (emphasis original). Here, the interests of A and B have ripened into adverse interests involved in litigation through the initiation of the lawsuit in Case No. 2, and there is a potential of a conflict of interest in Case No. 1. Both conflicts relate to the issue of A's employment and the identity of his employer. The matter of employment in Case No. 2 is important to the eventual outcome of that suit; it appears that it might also be an issue that will be litigated for eventual resolution of who is liable to the plaintiffs in Case No. 1. What the attorney may learn from A in connection with Case No. 1 might be useful on B's behalf in Case No 2, or, in the reverse, the representation of B in Case No. 2 might reveal information advantageous to A in Case No. 1. It appears, then, that it will not be possible for the attorney to represent both A and B without causing detriment to one or the other. This is the situation the Valley Title

court was concerned with, and under that authority, the attorney cannot represent both A and B even if they both desire that he or she continue to do so. In fact, the attorney at this point should not act on behalf of either A or B in matters related to the issues presented by the present litigation because of the assumption that during the course of his or her representation of both of them in these two substantially related matters he or she has obtained confidential information from them. It would be a violation of the attorney-client relationship if he or she continued to represent one against the other. The attorney should withdraw from representation in both cases.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 396

(April 1, 1982)

LOYOLA LAW SCHOOL
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CONFIDENTIAL COMMUNICATIONS -- DISCLOSURE --
BREACH OF DUTY ASSERTED BY FORMER CLIENT.
There is no attorney-client privilege with respect to facts asserted by a former client to be a breach of duty. A former attorney should, when asked, supply a declaration setting forth the facts as known to the attorney.

AUTHORITIES CITED:

B&P 6068; E.C. 958
LACBA Opinion No. 386

An attorney represented a client in two matters for litigation, each based on the same facts and business events. The client was uncooperative during trial preparation on the first case, insisting that necessary witnesses not be subpoenaed and assuring that the client would produce the witnesses. The witnesses did not appear; evidence offered in trial by the client was held to be false; and the client insisted on a frivolous appeal. The attorney refused to undertake the appeal and sought to be substituted out of the second case.

The client thereafter failed to pay the attorney's bills; failed to return telephone calls; failed to meet with the attorney to prepare for trial and refused to sign a substitution form. The attorney moved to be relieved and gave notice to the client. After some negotiation, the client did sign a stipulation for substitution of counsel and the requested

withdrawal was not heard by the court. The attorney further notified opposing counsel of the withdrawal.

The second case came on for trial. The attorney did not appear and a judgment was entered against the client in default.

Another attorney now represents the former client and is seeking to set aside the default on the ground that the client was uninformed; the new attorney has also indicated that a malpractice action is in contemplation. Opposing counsel, resisting the relief from default, has asked for a statement from the enquiring attorney concerning notice of withdrawal, and the notice to client concerning discovery, arbitration, and the date of trial. The enquiring attorney asks the advice of this Committee whether it is a breach of ethics to provide a statement which would be against the interest of the former client.

This Committee has recently addressed the high responsibility of counsel to maintain inviolate the secrets and confidences of a client and former client. See Opinion No. 386. That duty, however, does not exist when the former client attacks the attorney's integrity, good faith, authority or performance of duty. Evidence Code Section 958 sets forth the public policy which declares that there is no attorney-client privilege in such a situation. In commentary to that Section, the Law Revision Commission stated in part: "It would be unjust to permit a client . . . to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge. . . ." See Pacific Tel. & Tel. Co. v. Fink (1956) 141 CA 2d 332.

It is the view of this Committee, therefore, that it is not a violation of Business and Professions Code, Section 6068, nor of any Rule of Professional Conduct, for the attorney to supply a declaration when asked to do so by counsel opposing the interest of the former client. The Committee does not, however, express any opinion as to the propriety of the attorney's former conduct.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 397

(March 11, 1982)

LOYOLA LAW SCHOOL
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COMMUNICATION BY ATTORNEY WITH OPPOSING SIDE REGARDING MATTERS NOT IN CONTROVERSY. CONFLICT OF INTEREST IN STOCKHOLDERS DERIVATIVE ACTION. DUAL REPRESENTATION OF DIRECTORS AND CORPORATION. Although litigation is pending against a corporation represented by counsel, no ethical rule prohibits a lawyer for plaintiff from communicating with the corporation on matters not involved in the action. Under the facts of the instant inquiry, counsel for the corporation should not represent both it and the Board of Directors absent consent.

AUTHORITIES CITED:

Opinion 842, N.Y.C.B.A.
15 Record 80 (1960).
ABA Code of Professional
Responsibility DR 5-105,
DR 7-104(A) (1), EC 5-15,
EC 5-18. California
Rules of Professional
Conduct 5-102, 7-103,
2-107. Jacuzzi v. Jacuzzi
Bros., 243 Cal.App.2d 1,52
Cal.Rptr. 147 (1966).
31 Hastings L.J. 347 (1979).
94 Harvard 1244, 1341 (1981).

An attorney, A, inquires as to the propriety of conduct of counsel engaged in a stockholders derivative action, and states the following facts.

A is a member, by reason of ownership of a condominium, in a Homeowners Association. The Association is a non-profit mutual benefit corporation.

A on behalf of himself and other homeowner-members has brought a derivative action against the members of the Board of Directors of the Association for having imposed allegedly willful illegal special assessments upon the

the members. The Association having refused to institute action upon demand was also named a defendant.

The Association retained Attorney B, who had not previously represented the Association, to defend the corporation and the individual members of the Board of Directors. The Association is paying B's fees out of the ordinary maintenance assessments imposed and collected from the members. B was introduced to the Association by one of the defendant directors, for whom he is allegedly regular counsel. The lawsuit is now pending.

Under the by-laws of the homeowners association, the corporation has not undertaken to defend the directors, but only to indemnify and hold them harmless against all contractual liabilities to others arising out of good faith contacts made by the Board on behalf of the Association. This appears not to be such a contract liability.

On the basis of these facts, A asks the following questions.

[1] During the pendency of the lawsuit, may A exercise his rights as a member of the Homeowners Association with respect to Association matters other than those involved in the litigation and may he communicate directly with the Association on such other matters?

[2] If A continues to possess all his rights as a member of the Association, and is exercising these rights on matters not involved in the lawsuit, must he first contact the attorney retained by the Association to defend the lawsuit and/or send him copies of all communications with the Association on such matters?

[3] Is there such a conflict of interest between the Association and its directors, as to make it improper for B to represent both the Association and the members of the Board in this litigation?

[4] Is the corporation entitled to independent legal advice as to the position it should adopt, and can counsel who represents the individual directors, render such advice?

[5] May B accept a fee from the Association to

represent it as well as the individual members of the Board, prior to the adjudication of the liability of the members to the Association and its members?

We address these questions in the order in which they are posed.

(1) We perceive no ethical impropriety in A's continuing to exercise his rights as a member of the Homeowner's Association during the pendency of the stockholder's derivative action. It is improper for a lawyer to communicate directly or indirectly with a party represented by counsel when the subject of the communication relates to a matter in controversy. Rule 7-103 California Rules of Professional Conduct. See also ABA DR 7-104(A)(1). With respect to a matter not involved in the derivative action the rule would not apply and we see no impropriety in A's communicating directly with the Homeowner's Association on any such matter.

(2) The answer to this question is implied in our view that A may without breaching any rule of ethics communicate directly with the Homeowner's Association on a matter not involved in the pending litigation. We see no problem of ethics in his failing to contact counsel for the Homeowner's Association on such extraneous matters or to send counsel copies of correspondence with the Association concerning such matters.

(3) and (4) As to whether B's dual representation of the Association and the Board of Directors is ethically improper, it should be noted that the underlying ethical question involves the propriety of a lawyer's representing adverse interests, a matter addressed in Rule 5-102 which prohibits such representation absent the written consent of all parties. See also ABA DR 5-105, EC 5-15, EC 5-18. There are further questions whether the interests of the parties are adverse in a given case and whether a corporation, acting through its directors, is capable of giving valid consent.

In Opinion 842, the Committee on Professional Ethics of the Association of the Bar of the City of New York stated that a conflict of interest is inherent in

any derivative action whenever relief is sought on behalf of the corporation against the individual director-officer defendants and warned that extreme caution should be exercised in resorting to consent to justify dual representation. The Committee was divided as to whether it is in all cases improper for a law firm to represent both the corporate defendant and the individual directors alleged to have engaged in wrongdoing to the detriment of the corporation. It was of the opinion that such representation would be clearly improper in cases where the corporation might have to take an active part in the action adverse to the directors. 15 Record of N.Y.C.B.A. 80 (1960).

Law review comment and case law on the subject is extensive, the trend generally being to disapprove such dual representation. See Comment, Disqualification of Corporate Counsel in Derivative Actions, 31 Hastings L.J. 347 (1979); Developments in the Law - Conflicts of Interest in the Legal Profession, 94 Har. L. Rev. 1244, 1339-1342 (1981). A California Court of Appeal has held that the same attorney may represent both the corporation and the individual directors prior to an adjudication that a conflict actually exists. *Jacuzzi v. Jacuzzi Bros.*, 243 Cal.App.2d 1, 52 Cal.Rptr. 147 (1966). This Committee does not speculate on how the California courts will resolve this issue of dual representation when the question is next presented. It is our opinion that the most compelling argument under the facts here stated and that which would most efficiently safeguard the rights of all litigants involved would be to not allow dual representation of both the Directors and the corporation by the same attorney without consent. This will at the same time maintain the independent judgment of the lawyer and not dilute his loyalty to his clients.

(5) Whether B's fees may lawfully be paid by the Homeowner's Association is a question of law not within the purview of this Committee. Rule 2-107 provides that a lawyer shall not enter into an agreement for, charge or collect an illegal fee.

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and opinions are based on such facts only as are set forth in the questions presented.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 398

(May 6, 1982)

SECURITY AGREEMENTS FOR THE PAYMENT OF LEGAL FEES - RESULTING CONFLICTS AND ATTORNEYS' OBLIGATIONS TO DOCUMENT THE CONFLICT. It is ethically proper for a law firm, under specified circumstances, to take a security interest in a client's assets to secure payment of fees.

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AUTHORITIES CITED:

California Rules of Professional Conduct 1-102(A), 5-101, 5-102; Eschwig v. State Bar, 1 Cal.3d 8, 15-17 (1969); Magee v. State Bar 58 Cal.2d, 423, 431 (1962).

The inquiring law firm has represented a client in a number of matters including a particular item of litigation. The client had accrued a substantial amount of fees and was experiencing cash flow difficulties which prevented it from paying the existing obligation to the firm or remaining current with new billings. The firm obtained security interests in some of the client's assets, but the value of the secured property was less than the amount of the client's existing debt to the firm.

In the litigation referred to, a final judgment was entered against the client, the client was unable to satisfy the judgment, and judgment debtor proceedings followed. In those proceedings, information concerning the firm's security interests was revealed. The judgment creditor moved the court for an order declaring the security interests void. The court entered an order that the security interests "...were presumptively fraudulent conveyances as to the (judgment creditor) and are hereby declared void and invalid as to (the judgment creditor) subject to the (client's) right to petition this Court, within thirty (30) days hereof, requesting a full evidentiary hearing in order to present evidence rebutting the finding...".

After receiving a copy of this order from the firm, the client sent to it two letters dated November 12, 1982. The first made a demand upon the firm for return of the collateral covered by the security interests (in order to comply with the recent order). The second letter recited that the same demand had been made on the firm by telephone and rejected by it and, as a consequence, requested that the firm withdraw as counsel for the client in that litigation and transmit all necessary files and substitutions of attorney to the client's new litigation attorneys. The second letter went on to state that the client's discharge of the firm applied only to the specific litigation, and the firm was requested to continue to represent the client in all other matters. The letter acknowledged the client's

understanding of a potential conflict of interest and waived the conflict in requesting the firm to continue its representation on other matters. One of the attorneys in the firm participated in the drafting of the second letter.

The necessary substitutions of attorney were prepared and the litigation files were sent to the client's new litigation counsel. The firm subsequently withdrew as counsel for the client in all matters because the court had questioned the propriety of its continued representation of the client in view of the demands under the pledge agreements, leaving a consequent possibility of an appearance of impropriety in the other matters, and because the client had failed to pay fees and costs as agreed with the firm.

Based on these facts, the firm requests the committee's opinion on the following issues: (1) The propriety of the firm's practice of entering into pledge agreements with existing clients to secure the payment of fees; (2) The propriety of the firm's refusal to turn over to the client or anyone else the pledged property until the secured obligations had been satisfied; (3) The propriety of the firm assisting in the preparation of the second November 12, 1981 letter; (4) The propriety of the firm's continued representation of a client pursuant to the client's written request and written waiver of conflict of interest;

and (5) The propriety of the firm proceeding to foreclose upon its security for non-payment of legal fees in the circumstances presented.

1. There is no absolute prohibition on an attorney acquiring a security interest in the assets of existing clients to secure the payments of fees. Rule 5-101 of the Rules of Professional Conduct states:

"A member of the State Bar shall not enter into a business transaction with the client or knowingly acquire an interest, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto."

There is nothing in the facts presented which suggests any violation of Rule 5-101, but this committee cannot make such a determination in an ex parte action of this kind. We caution that: "In civil cases, 'there are no transactions respecting which courts...are more jealous and particular, than dealings between attorneys and their clients...' (cite omitted)" Magee v. State Bar, 58 Cal.2d 423, 431 (1962); Eschwig v. State Bar, 1 Cal.3d 8, 15-17 (1969).

2. The question of the propriety of the firm's refusal to turn over the pledged property is a legal issue, involving the meaning and finality of the court's order, and not an ethical issue. We express no opinion on this question.

3. We find nothing in the Rules of Professional Conduct which suggest any impropriety in the firm's participation in the drafting of the second November 12 letter. We see no reason why it would not have been proper for the firm to draft the entire letter and submit it for signature by the client. The heart of the second November 12 letter was an explanation by the firm of the potential conflict, and it was the firm's obligation under Rule 5-102 to give this explanation to its client.

5. The propriety of the firm proceeding to foreclosure of its security interests, like the second question, is a legal rather than ethical matter on which the committee expresses no opinion.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 399

(May 6, 1982)

TRIAL COUNSEL'S DUTY TO WITHDRAW BECAUSE HE INTENDS TO CALL A FORMER ASSOCIATE AS A WITNESS. California Rule of Professional Conduct 2-111(A) (4) applies to this situation but does not here require the withdrawal of trial counsel if its client knowingly consents to the continued representation.

AUTHORITIES CITED:

Lyle v. Superior Court,
122 Cal.App.3d 470 (1981);
People ex rel. Younger v.
Superior Court, 86 Cal.App.
3d 180 (1978); Comden v.
Superior Court, 20 Cal.3d
906 (1978).

A law firm is serving as co-counsel in pending copy-right infringement cases. It intends to call as a witness, a former associate of the firm, apparently to testify on two separate points:

First, to his policing in behalf of the client of copyright pirates and infringers; and second, to his policing of the defendant in these cases which resulted in notice to it of the copyright claim. The law firm also intends to seek the

introduction into evidence of letters and other materials prepared by its former associate in his copyright policing activities. On the basis of these facts, it asks whether it should withdraw as trial counsel.

The governing rule is California Rule of Professional Conduct 2-111(A)(4). As amended after the Supreme Court's decision in Comden v. Superior Court, the rule states:

"(4) If upon or after undertaking employment, a member of the State Bar knows or should know that the member ought to be called as a witness on behalf of the member's client in litigation concerning the subject matter of such employment, the member may continue employment only with the written consent of the client given after the client has been fully advised regarding the possible implications of such dual role as to the outcome of the client's cause and has had a reasonable opportunity to seek the advice of independent counsel on the matter. In civil proceedings, the written consent of the client shall be filed with the court not later than the commencement of trial. In criminal proceedings, the written consent need not be filed with the court but the member has the duty, before testifying, of satisfying the court that such consent has been obtained from the client if representing the defendant. The member may continue employment and

the client's consent need not be obtained in the following circumstances:

(a) If the member's testimony will relate solely to an uncontested matter; or

(b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the member's testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer by his firm to the client; or

(d) If the member is representing the People, if the member obtains the consent of the head of the particular office representing the People, and if the member's continued representation is not inconsistent with the principles of recusal."

The court in People ex rel. Younger v. Superior Court, supra at 197, gives the following explanation for Rule 211(A)(4)

"Four commonly accepted bases for the rule are alluded to in Ethical Consideration EC5-9 of the Code of Professional Responsibility [cite omitted]

as well as numerous of the authorities just cited: (1) because of interest or the appearance of interest in the outcome of the trial, the advocate who testifies at trial may be subject to impeachment and the evidentiary effect of his testimony will be weakened; (2) opposing counsel may be handicapped in cross-examining and in arguing the credibility of trial counsel who also acts as a witness for his client; (3) an advocate who becomes a witness may be in the unseemly position of arguing his own credibility, which may, in itself or in combination with the jurors' tying his persuasiveness as an advocate to his credibility as a witness, make him a less effective **advocate**; (4) the role of advocate and witness are entirely inconsistent and should not be assumed by one individual. Reason (4) may properly be divided into several sub-reasons: (a) the attorney's zeal as an advocate may becloud his objectivity as a witness; (b) the advocate who acts as a witness for his client may find it difficult to keep separate in his mind the matters of which he has personal knowledge and the evidence in the case; (c) the jury may have difficulty keeping properly segregated the arguments of the attorney acting as advocate and his testimony as a witness; and (d) in some instances the advocate's testimony may be such as to be tantamount or be taken by the jury as tantamount to an expression by the advocate of his

personal opinion as to the justness of his cause, the credibility of one or more witnesses, the culpability of a civil litigant or the guilt or innocence of a criminally accused, which, of course, would be improper [cites omitted]. A fifth generally accepted basis for the rule, said by Professor Wigmore to be 'the most potent and most common reason judicially advanced' [cite omitted], but curiously, not mentioned in Ethical Consideration EC5-9 or Formal Opinion 339, is the appearance of impropriety: ' . . . not that lawyers as witnesses may distort the truth in favor of the client, but that the public will think they may, and that the public's respect for the profession and confidence in it will be effectively diminished.' [cite omitted]." [footnotes omitted].

Although Rule 211(A)(4) by its terms speaks only of an individual attorney who acts both as trial counsel and witness, the rule also applies when the trial attorney and witness are different members of the same law firm. The court in People ex rel. Younger discusses this point in detail at pages 198-203, acknowledging that the objections to the dual capacity become attenuated when different individuals are involved. When the witness is no longer associated with a law firm, the objections become even more attenuated.

Objections Nos. 2 and 4 listed in People ex rel. Younger

fall entirely. Objections 1, 3, and 5 remain and should be considered.

The objection that the witness may be ineffective because of interest or appearance of interest in the outcome of the trial, for example, because the witness is defending his own conduct, remains when the witness is a former associate. Trial counsel may be put in the position of defending the conduct of his own firm. As the court in People ex rel. Younger points out in its footnote 18, the ineffective witness argument is not a persuasive basis on which to ground an ethical duty for the lawyer to withdraw from the case if the client's consent to the potential problem is obtained. Rule 211(A)(4) provides for the written consent of the client after full advice and the opportunity to seek independent counsel, and with this consent the first objection is satisfied.

The third objection, that an advocate may become less effective because he is arguing his own credibility or because his persuasiveness as an advocate is tied to his credibility as a witness, also remains because of the possibility that trial counsel will appear to be advocating his own firm's conduct. This point similarly is obviated by the client's written consent in conformity with Rule 211(A)(4).

The fifth objection, that there will be an appearance of impropriety to the extent that the public thinks that the attorney-witness may distort the truth in favor of his client, is

substantially diluted by the lack of current relationship between the witness and the client.

The opinion in Lyle v. Superior Court points out that the existing Rule 211(A)(4) is an amended rule and substantially changes the emphasis from that described in the Supreme Court's opinion in Comden v. Superior Court. The Lyle court explains that now: "the trial court, when balancing the several competing interests, should resolve the close case in favor of the client's right to representation by an attorney of his or her choice and not as in Comden, in favor of complete withdrawal of the attorney. Under the present rule, if a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to deny this choice to the party without a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process [citations omitted]. In other words, under the present rule, the trial court can disqualify counsel only where it is confronted with manifest interests which it must protect from palpable prejudice [citations omitted]."

The balancing of competing interests must include those of the client which has an interest in competent representation by an attorney of his or her choice and in avoiding inconvenience and duplicative expense in replacing counsel already thoroughly familiar with the case. The existing law firm also has a valid interest in continuing to represent the client. Lyle v. Superior Court, supra at 481.

Based on the facts presented by the inquiry, and assuming that the client gives written consent to the law firm's continued employment in conformity with Rule 211(A)(4), we conclude that there is no suggestion of the kind of convincing demonstration of detriment or injury to the integrity of the judicial process which is required under Rule 211(A)(4) for the disqualification of trial counsel. We assume in reaching this conclusion that none of the exceptions to Rule 211(A)(4) apply.

The inquiry stated that the trial is to take place in Texas. Nevertheless, this opinion is based on the California Ethics Rules, and no opinion is expressed either on the Texas Ethics Rules or the question of which rules are applicable to California attorneys acting in another state.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION

UCLA LAW SCHOOL

ETHICS COMMITTEE

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FORMAL OPINION NO. 400

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(June 3, 1982)

ATTORNEY AND CLIENT--CONFIDENTIAL COMMUNICATIONS--
DISCLOSURE. An attorney who has represented a
client in an application for admission to the State
Bar of California is ethically proscribed from dis-
closing to the Committee of Bar Examiners either
the name of the ex-client or any matter, including
fee disputes, which arose directly or indirectly
from the prior representation.

AUTHORITIES CITED:
California Business &
Professions Code §6068(e);
ABA Code of Professional
Responsibility Canon 4;
ABA DR 4-101(A); Formal
Opinion 159; Informal
Opinion 1981-1; People v.
Canfield (1974) 12 Cal.3d
699.

Attorney was retained by Ex-client for representation
in an application to practice law which was then pending, and
still is pending, before the Committee of Bar Examiners of the
State Bar of California. At that time it was agreed that
Attorney would employ Ex-client as a law clerk in order to
mitigate the costs of the representation. For about a year
Attorney represented Ex-client in the application to practice
law. Meanwhile, Ex-client performed and was paid for law clerk
services by Attorney. Ex-client's duties were not restricted
to his own case. Eventually, Attorney confronted Ex-client
with what Attorney terms were "great arrearages" in respect to
legal fees incurred on behalf of Ex-client. Ex-client then

prepared a list of services he had performed on various cases for Attorney which Ex-client claimed as an offset against the cost of Attorney's fees. Fee disputes arose and Attorney was relieved as Ex-client's counsel. Both Ex-client and Attorney have agreed to binding arbitration on the matter of the fee disputes.

Attorney now contends that Ex-client's fee claims are false, known to be false by Ex-client, and may constitute moral turpitude. Attorney reports that the present conduct of Ex-client involves matters which have "primarily arisen" during the time Ex-client has not been represented by Attorney. It appears to this Ethics Committee, however, that the disputes arose out of the prior attorney-client/law clerk-employer relationships. Attorney inquires whether it is ethically permissible for him to bring to the attention of the Committee of Bar Examiners the name and the alleged fee dispute improprieties of his Ex-client.

California Business and Professions Code §6068(e) provides: "It is the duty of an attorney [t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." ABA Code of Professional Responsibility Canon 4 also prohibits a lawyer from revealing the confidences or secrets of a client. "'Confidence' refers to information protected by the attorney-client privilege under applicable law. ..." (DR 4-101(A).) The California Supreme Court has interpreted the scope of the attorney-client privilege broadly (People v. Canfield (1974) 12 Cal. 3d 699,705). "'[S]ecret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." (DR 4-101(A).) Once the duty to preserve client confidentially or client secrets is

established, it outlasts the attorney-client relationship (Formal Opinion 159; Informal Opinion 1981-1).

Since both the matter before the Committee of Bar Examiners and the allegations made by Attorney concern moral turpitude, it is the opinion of this Ethics Committee that any information obtained by attorney as a result of the law clerk-employer relationship which reflects on Ex-client's moral character cannot be segregated from the simultaneous attorney-client relationship. The proposed disclosure by Attorney to the Committee of the Bar Examiners of Ex-client's present moral character derives from and is confidential to the attorney-client relationship and also concerns secrets of Ex-client, as defined by DR 4-101(A). It therefore is the opinion of this Ethics Committee that it would be ethically improper for Attorney to disclose to the Committee of Bar Examiners either name of Ex-client or any matter bearing on the moral character of his former client. (Business and Professions Code §6068(e); ABA Canon 4.)

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.

401

12/15-82

Opinion No. 401 (December 15, 1982)
(Revised)*

**FINANCIAL ARRANGEMENT WITH
NONLAWYERS - PROFESSIONAL EMPLOY-
MENT** - It is unethical for an attorney to enter in-
to an agreement with an organization whereby
the attorney agrees to provide legal services to
the organization at a reduced rate, but the
membership of the organization derives no
benefit from the agreement; or where
employees of the organization are compelled,
with the attorney's knowledge, to refer the
membership to that attorney.

Authorities Cited:

California Rules of Professional Conduct, Rules
2-101(A)(6); 2-101(C); 3-102.

A membership organization and an attorney entered into an agreement whereby the organization would refer its membership to the attorney who, in turn, would provide only the organization with legal services at a reduced rate. The members referred by the organization to the attorney would not receive any discount for services rendered by the attorney. Employees of the organization would be disciplined for failure to refer members of the organization to the attorney when members of the organization inquired about legal services. The Committee is asked to comment on the ethical propriety of this arrangement.

California Rule of Professional Conduct Rule 3-102(B) provides that a member of the State Bar shall not compensate any person or entity for the purpose of recommending or securing the at-

torney's employment. This Committee is of the opinion that the fee discount available only to the organization for its referrals is compensation proscribed by Rule 3-102(B). Rule 3-102(B) is sufficiently expansive to prohibit this type of arrangement even where the organization does not directly share in the attorney fees generated through the referrals.

California Rules of Professional Conduct Rule 2-101(C) provides that a member of the State Bar "shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of (A) or (B) of this rule 2-101." Rule 2-101(A)(6) prohibits a communication concerning the availability of professional employment by an attorney which is transmitted in a manner which involves "intrusion, coercion, duress, compulsion, intimidation, threats or vexation or harrassing conduct." The organization's threat or actual discipline of its employees for failure to refer organization members to the attorney violates Rule 2-101 where the attorney is aware of this aspect of the agreement.

*Based upon a clarified statement of the facts, original Formal Opinion No. 401 (August 25, 1982) is withdrawn and is replaced by this Formal Opinion No. 401 (revised) (December 15, 1982).

402

torney's employment. This Committee is of the opinion that the fee discount available only to the organization for its referrals is compensation proscribed by Rule 3-102(B). Rule 3-102(B) is sufficiently expansive to prohibit this type of arrangement even where the organization does not directly share in the attorney fees generated through the referrals.

California Rules of Professional Conduct Rule 2-101(C) provides that a member of the State Bar "shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of (A) or (B) of this rule 2-101." Rule 2-101(A)(6) prohibits a communication concerning the availability of professional employment by an attorney which is transmitted in a manner which involves "intrusion, coercion, duress, compulsion, intimidation, threats or vexation or harassing conduct." The organization's threat or actual discipline of its employees for failure to refer organization members to the attorney violates Rule 2-101 where the attorney is aware of this aspect of the agreement.

*Based upon a clarified statement of the facts, original Formal Opinion No. 401 (August 25, 1982) is withdrawn and is replaced by this Formal Opinion No. 401 (revised) (December 15, 1982).

Opinion No. 402 (August 25, 1982)

AIDING UNAUTHORIZED PRACTICE OF LAW — DELEGATION OF PROFESSIONAL FUNCTIONS. An attorney may ethically provide a client with a sample complaint and stipulation for entry of judgment to be used by the client in connection with the collection of the client's delinquent accounts provided, however, that the client not be permitted to send out any letter, pleading or other document bearing the attorney's name unless collection of the specific account is being handled directly by and under the supervision of the attorney.

Authorities Cited:

California Rules of Professional Conduct 3-101(A), Opinion Nos. 61, 185, 338
Informal Opinion No. 68-3;
ABA Opinion No. 253; EC 3-7; DR 7-102(A)(5).

An attorney has requested an opinion of the ethical propriety of permitting a client to distribute to its credit managers for purposes of collecting delinquent accounts a sample Stipulation for Entry of Judgment, a sample Complaint in Common Counts, and a letter explaining the nature of a Stipulation for Entry of Judgment and setting forth a payment schedule.

The Stipulation for Entry of Judgment, if signed by a customer of the client, would be returned to the attorney's office to be filed with the court in the event that the customer failed to make payments to the client as set forth in a letter agreement entered into between the client and the

customer. The letter agreement would be entered into without the direct assistance of the attorney and would be on the stationery of the client and would be signed by the client.

The proscription against a non-lawyer practicing law does not prevent a layman from representing himself. EC 3-7. However, the facts presented are not sufficient to determine whether the client would be representing himself or a corporation or whether the claims managers would be representing the client. It is not a function of this committee to resolve a question of law such as whether a layman will be engaged in the unauthorized practice of law. If either the client or the claims managers would be engaged in such unauthorized practice, an attorney may not aid such practice by providing the forms. Rule 3-101(A).

Assuming there would be no unauthorized practice of law, the use of a form bearing an attorney's name in connection with the collection of delinquent accounts by a client, when that account has not been specifically turned over to the attorney for collection in the usual sense, is a violation of a number of ethical considerations. When the attorney does not determine whether the provisions of a collection letter or complaint conform to the facts of a particular situation, the use of a form bearing the attorney's name is an improper delegation of professional discretion. Opinion 338, Informal Opinion 68-3. Similarly, the use of such forms by a client has been considered to be an unethical exploitation of an attorney's services by a layman. Opinions 61 and 185. Finally, the obvious purpose of such activity being to make the debtor believe that the account is in an attorney's hands, it is unethical for a lawyer to be a party to such deception. See ABA Opinion 253, Informal Opinion 68-3, DR 7-102(A)(5).

So long as the Stipulation for Entry of Judgment and sample complaint do not bear the name of the attorney, there is no ethical impropriety in providing such samples to a client to be used by the client in its dealings with its own delinquent accounts. The use by a layman of sample legal forms which do not bear the name of an attorney is not an exploitation of the services of a lawyer which intervenes between the lawyer and the client as contemplated by former ABA Canon 35. See, also, Opinion No. 61.

However, a letter bearing the name of the attorney explaining the nature of a Stipulation for Entry of Judgment, or serving as a letter agreement between the client and its delinquent account, which was not written by the attorney with respect to a particular account which had been turned over to him by the client for collection, would be improper for the reasons set forth above.

Opinion No. 403 (October 20, 1982)

CONFIDENTIAL INFORMATION. An attorney may not, without the client's consent, give to a charity summarized or statistical information concerning estate planning performed by the attorney for clients referred by the charity.

403

torney's employment. This Committee is of the opinion that the fee discount available only to the organization for its referrals is compensation proscribed by Rule 3-102(B). Rule 3-102(B) is sufficiently expansive to prohibit this type of arrangement even where the organization does not directly share in the attorney fees generated through the referrals.

California Rules of Professional Conduct Rule 2-101(C) provides that a member of the State Bar "shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or tapper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of (A) or (B) of this rule 2-101." Rule 2-101(A)(6) prohibits a communication concerning the availability of professional employment by an attorney which is transmitted in a manner which involves "intrusion, coercion, duress, compulsion, intimidation, threats or vexation or harrassing conduct." The organization's threat or actual discipline of its employees for failure to refer organization members to the attorney violates Rule 2-101 where the attorney is aware of this aspect of the agreement.

*Based upon a clarified statement of the facts, original Formal Opinion No. 401 (August 25, 1982) is withdrawn and is replaced by this Formal Opinion No. 401 (revised) (December 15, 1982).

Opinion No. 402 (August 25, 1982)

AIDING UNAUTHORIZED PRACTICE OF LAW — DELEGATION OF PROFESSIONAL FUNCTIONS. An attorney may ethically provide a client with a sample complaint and stipulation for entry of judgment to be used by the client in connection with the collection of the client's delinquent accounts provided, however, that the client not be permitted to send out any letter, pleading or other document bearing the attorney's name unless collection of the specific account is being handled directly by and under the supervision of the attorney.

Authorities Cited:

California Rules of Professional Conduct 3-101(A), Opinion Nos. 61, 185/338
Informal Opinion No. 68-3;
ABA Opinion No. 253; EC 3-7; DR 7-102(A)(5).

An attorney has requested an opinion of the ethical propriety of permitting a client to distribute to its credit managers for purposes of collecting delinquent accounts a sample Stipulation for Entry of Judgment, a sample Complaint in Common Counts, and a letter explaining the nature of a Stipulation for Entry of Judgment and setting forth a payment schedule.

The Stipulation for Entry of Judgment, if signed by a customer of the client, would be returned to the attorney's office to be filed with the court in the event that the customer failed to make payments to the client as set forth in a letter agreement entered into between the client and the

customer. The letter agreement would be entered into without the direct assistance of the attorney and would be on the stationery of the client and would be signed by the client.

The proscription against a non-lawyer practicing law does not prevent a layman from representing himself. EC 3-7. However, the facts presented are not sufficient to determine whether the client would be representing himself or a corporation or whether the claims managers would be representing the client. It is not a function of this committee to resolve a question of law such as whether a layman will be engaged in the unauthorized practice of law. If either the client or the claims managers would be engaged in such unauthorized practice, an attorney may not aid such practice by providing the forms. Rule 3-101(A).

Assuming there would be no unauthorized practice of law, the use of a form bearing an attorney's name in connection with the collection of delinquent accounts by a client, when that account has not been specifically turned over to the attorney for collection in the usual sense, is a violation of a number of ethical considerations. When the attorney does not determine whether the provisions of a collection letter or complaint conform to the facts of a particular situation, the use of a form bearing the attorney's name is an improper delegation of professional discretion. Opinion 238, Informal Opinion 68-3. Similarly, the use of such forms by a client has been considered to be an unethical exploitation of an attorney's services by a layman. Opinions 61 and 185. Finally, the obvious purpose of such activity being to make the debtor believe that the account is in an attorney's hands, it is unethical for a lawyer to be a party to such deception. See ABA Opinion 253, Informal Opinion 68-3, DR 7-102(A)(5).

So long as the Stipulation for Entry of Judgment and sample complaint do not bear the name of the attorney, there is no ethical impropriety in providing such samples to a client to be used by the client in its dealings with its own delinquent accounts. The use by a layman of sample legal forms which do not bear the name of an attorney is not an exploitation of the services of a lawyer which intervenes between the lawyer and the client as contemplated by former ABA Canon 35. See, also, Opinion No. 61.

However, a letter bearing the name of the attorney explaining the nature of a Stipulation for Entry of Judgment, or serving as a letter agreement between the client and its delinquent account, which was not written by the attorney with respect to a particular account which had been turned over to him by the client for collection, would be improper for the reasons set forth above.

Opinion No. 403 (October 20, 1982)

CONFIDENTIAL INFORMATION. An attorney may not, without the clients consent, give to a charity summarized or statistical information concerning estate planning performed by the attorney for clients referred by the charity.

Authorities Cited:

California Business & Professions Code 6068 (e); Formal Opinions 378, 358, 298 and 229

An attorney who volunteers as chairman of the estate planning committee of a charity has had potential estate planning clients referred to him by the charity. The charity has requested that the attorney tell it of the extent to which these referrals had resulted in wills or trusts naming the charity as a beneficiary. The attorney asks whether he properly can provide any form of statistical or summarized information to the charity concerning the planning work he has done for its referrals.

California Business and Professions Code 6068 states that it is the duty of an attorney: "... (e) To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets, of his clients."

Under this section, no attorney may reveal the secrets of his client without the client's consent (other than for some narrow exceptions, for example, with regard to criminal activity). The application of this section to wills has been recognized. See L.A. Ethics Opinion No. 229. The difficulty is not remedied by providing the requested information in statistical form; statistics may reveal something about the individual and, even if they do not, every client is entitled to know that his confidences are rigorously maintained by his attorney and will not even be suggested or hinted at by the attorney to others. The convenience of others is not a sufficient reason for endangering confidences or causing clients to apprehend that confidences may be endangered.

The precise question we have been asked has not before been addressed by this committee, but some earlier opinions are helpful. For example, Opinion No. 358 concluded that a legal aid attorney may not disclose confidential financial information regarding a client's eligibility to the foundation board of directors without the client's consent. Opinion No. 378 concluded that a non-attorney, undertaking a research project involving a legal services program sponsored by the local bar association, may not, without the client's consent be given summarized information containing a client's confidential information even though the client is not named and the information is in a form that could not reasonably be expected to reveal the client's identity.

Opinion No. 378 suggests that the method for capsulizing information may make it no longer confidential in nature. We urge extreme caution with this logic. What may be true of a legal services program having thousands of clients and cases is not likely to be true of an individual attorney or firm handling a relatively small number of estate plans and trusts referred by a single charity. We conclude that if the charity thinks the information is important, it should ask the clients directly.

Finally, the attorney should keep in mind L.A. Ethics Opinion No. 298. It concludes that a lawyer may not properly represent a charity as prospective beneficiary and at the same time an individual as donor in preparing wills and trusts. Any suggestion implicit in the charity's request for information, that the attorney has any obligation to the

charity with regard to the content of the wills and trusts he prepares, raises the possibility of a conflict of interest. This danger naturally must be carefully avoided.

Opinion No. 404 (January 19, 1983) (Revised)

SOLICITATION AND ADVERTISING - Advertising, including solicitation by mail, is authorized by the Rules of Professional Conduct. Advertising may not be false or misleading. Solicitation may be prohibited.

Authorities Cited:

Allison v. Louisiana State Bar Association, 362 So.2d 489 (La. 1978); *Bar Association of San Francisco Opinion No. 1979-1*;
Bates v. State Bar of Arizona, 433 U.S. 350 (1977);
Bigelow v. Virginia, 421 U.S. 809 (1975);
Bishop v. Committee of Professional Ethics, 521 F.Supp. 1219 (S.D. Iowa 1981);
Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980);
Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W. 2d 55 (1980), cert. denied, 450 U.S. 966 (1981);
The Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1982);
In re Appert, 315 N.W.2d 204 (Minn. 1981);
In re Carroll, 124 Ariz. 80, 602 P.2d 461 (1979);
In re Greene, 54 N.Y.2d 118, 444 N.Y.S.2d 883 (1981), cert. denied, --- U.S. ---, 102 S.Ct. 1738 (1982);
In re Primus, 436 U.S. 421 (1978);
In re R.M.J., --- U.S. ---, 102 S.Ct. 929 (1982);
In re Rule of Court, 564 S.W.2d 638 (Tenn. 1978);
In re Telchner, 75 Ill.2d 88, 387 N.E. 2d 265 (1979), cert. denied, 444 U.S. 917 (1979);
In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982);
In re Zimmerman, 79 App.Div.2d 263, --- N.Y.S.2d --- (1981);
Kansas v. Moses, 642 P.2d 1004 (Kan. 1982);
Kentucky Bar Association v. Gangwish, 630 S.W.2d 66 (Ky. 1982);
Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978);
Koffler v. Joint Bar Association, 51 N.Y.2d 140, 432 N.Y.S.2d 872 (1980);
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978);
State Bar of California Opinion No. 1980-54;
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

The Committee has received a number of inquiries relating to solicitation and advertising practices engaged in by members of the State Bar of California practicing in the Los Angeles area. The purpose of this opinion is to give general guidance with respect to advertising and solicitation of legal business.

The variety of advertising and solicitation utilized by the legal profession is limited only by the imagination of lawyers. The following categories pro-

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 404 (Revised)

(January 19, 1983)

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Allison v. Louisiana State Bar Association, 362 So.2d 469 (La. 1978); Bar Association of San Francisco Opinion No. 1979-1; Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Bigelow v. Virginia, 421 U.S. 809 (1975); Bishop v. Committee of Professional Ethics, 521 F.Supp. 1219 (S.D. Iowa 1981); Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980), cert. denied, 450 U.S. 966 (1981); The Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1982); In re Appert, 315 N.W.2d 204 (Minn. 1981); In re Carroll, 124 Ariz. 80, 602 P.2d 461 (1979); In re Greene, 54 N.Y.2d 118, 444 N.Y.S.2d 883 (1981), cert. denied, _____ U.S. _____, 102 S.Ct. 1738 (1982); In re Primus, 436 U.S. 421 (1978);

In re R.M.J., U.S. 102 S.Ct. 929 (1982); In re Rule of Court, 564 S.W.2d 638 (Tenn. 1978); In re Teichner, 75 Ill.2d 88, 387 N.E.2d 265 (1979), cert. denied, 444 U.S. 917 (1979); In re Utah State Bar Petition for Approval of Changes In Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982); In re Zimmerman, 79 App.Div.2d 263, N.Y.S. 2d (1981); Kansas v. Moses, 642 P.2d 1004 (Kan. 1982); Kentucky Bar Association v. Gangwish, 630 S.W.2d 66 (Ky. 1982); Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978); Koffler v. Joint Bar Association, 51 N.Y.2d 140, 432 N.Y.S.2d 872 (1980); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); State Bar of California Opinion No. 1980-54 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

The Committee has received a number of inquiries relating to solicitation and advertising practices engaged in by members of the State Bar of California practicing in the Los Angeles area. The purpose of this opinion is to give general guidance with respect to advertising and solicitation of legal business.

The variety of advertising and solicitation utilized by the legal profession is limited only by the imagination of lawyers. The following categories provide a basis for discussion:

- (1) Advertisement placed in the written media;
- (2) Advertisement by radio or television;
- (3) Announcements or other circulars sent to the general public;
- (4) Letters sent to individuals known or believed to have specific legal problems;
- (5) Personal solicitation, in person or by telephone, of individuals known or believed to have specific legal problems.

The recognition of constitutional protection for commercial speech and press, which began with Bigelow v. Virginia, 421 U.S. 809 (1975), has resulted in the federalization and constitutionalization of the regulation of lawyer solicitation and advertising. Four United State Supreme Court decisions substantially delineate the constitutional limits on the regulation of solicitation and advertising. California statutes and the Rules of Professional Conduct provide certain substantive rules within these limits.

The analytical structure for commercial speech regulation is provided in Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 566 (1980): (1) Is the commercial speech misleading or related to an unlawful activity? (2) Are the governmental interests sought to be

protected substantial? (3) How directly does the regulation advance these interests? (4) Is there a less restrictive alternative? In In re R.M.J. the United States Supreme Court's most recent opinion, it stated the standard for the regulation of lawyer solicitation and advertising as follows:

"[T]he state must assert a substantial interest and the interference with speech must be in proportion to the interest served. [Citing Central Hudson, supra.] Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest."

In re R.M.J., ___ U.S. ___, 102 S.Ct. 929, 937-938 (1982).

1. Printed Advertising

Advertising in the written media was authorized in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), where the United States Supreme Court held that the blanket prohibition of such advertising is not sufficiently related to the state's interest in protecting lawyer professionalism and the quality of legal services.

False, deceptive or misleading advertising is subject to restraint under Bates, 433 U.S. at 383, and In re R.M.J., ___ U.S. ___, 102 S.Ct., at 936, and is prohibited under Rule 2-101 of the California Rules of Professional Conduct. In addition, Rule 2-101(A)(6) prohibits any advertising or solicitation "transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."

Pursuant to authority delegated by Rule 2-101(D), the Board of Governors of the State Bar has determined that guarantees, warranties or predictions of the results of legal action and testimonials or endorsements of an attorney are presumed to be false, deceptive or misleading. In addition Rule 7.1 of the final draft of the Model Rules of Professional Conduct, proposed by the ABA Commission on Evaluation of Professional Standards, provides as follows:

"A communication is false or misleading if it:

"(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading:

"(b) is likely to create an unjustified expectation about results the lawyer can

achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

"(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."

In In re Zimmerman, 79 App.Div.2d 263, ____ N.Y.S.2d ____ (1981), a New York court interpreted its rule on misleading advertising to prohibit an attorney from advertising a specialty in which he was not experienced. Accord, In re Rule of Court, 564 S.W.2d 638, 644 (Tenn. 1978); cf. Kentucky Bar Association v. Gangwish, 630 S.W.2d 66 (Ky. 1982) (advertising of a discount).

Even when a communication is not misleading, the state retains some authority to regulate. Restrictions on the time, place and manner of protected speech may be valid where they leave open ample alternative channels for communication of the information. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Eaton v. Supreme Court of Arkansas, 27 Ark. 573, 607 S.W.2d 55 (1980) cert. denied, 450 U.S. 966 (1981); Bishop v. Committee on Professional Ethics, 521 F.Supp. 1219, 1230 (S.D.Iowa 1981).

2. Radio or Television Advertising

A note in Bates suggests that the distinctive characteristics of the electronic media (radio and television) may authorize additional regulation of attorney advertising through these media. 433 U.S., at 384 (dictum). This suggestion was followed in Bishop v. Committee on Professional Ethics, 521 F.Supp. 1219, 1229 (S.D. Iowa 1981), where the court approved Iowa's restrictions on the promotional content of attorney advertising. California has not adopted any rule to implement the suggestion. Accordingly, advertising through the electronic media is permitted in California to the same extent as printed advertising.

3. Announcements, Mailings and Handbills

The United States Supreme Court struck down limitations on announcement cards mailed to the general public in In re R.M.J., ____ U.S. ____, 102 S.Ct. 929 (1982). Accord, In re Utah State Bar Petition For Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1981). However, the Supreme Court did authorize states to require the filing of announcements, mailings and handbills with state authorities.

California's only regulation of announcements, mailings and handbills is in Rule 2-101(E), which requires

the retention of such materials for one year, making them available to the State Bar upon request, and providing supporting information upon request for any factual or objective claims. Such regulation is authorized by In re R.M.J. (The same rule applies to all advertising). See also In re Appert, 315 N.W.2d 204 (Minn. 1981).

4. Letters to Individual Prospective Clients

California regulation of solicitation in person, by telephone and by letters to individuals is regulated by Rule 2-101(B), which provides as follows:

"No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or 'communication' specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or 'communication' is

protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

"Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member of a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients."

This rule is very unsatisfactory, because it gives no guidance as to what kinds of otherwise prohibited conduct are constitutionally protected.

Although it may be thought that letters to individuals constitute solicitation that does not enjoy the commercial speech protection given to advertising, no neat line can be drawn between solicitation and advertising that makes sense on policy grounds. In re Appert, 315 N.W.2d 204 (Minn. 1981). All advertising involves solicitation, either implicitly or explicitly (although some solicitation is not advertising). Koffler v. Joint Bar Association, 51 N.Y.2d 140, 146, 432 N.Y.S.2d 872 (1980). Indeed, the United States Supreme Court itself, in giving first amendment protection to solicitation, has lumped commercial speech,

commercial advertising and solicitation together. Bigelow v. Virginia, 421 U.S. 809, 826 (1975). It also has approved solicitation by mail of clients with specific legal problems where the lawyer did not profit therefrom. In re Primus, 436 U.S. 415 (1978).

There is a division of authority as to whether direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech.^{*/} It has been approved in two states and in two California ethics opinions: Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978); Koffler, 51 N.Y.2d, at 143; State Bar of California Opinion No. 1980-54; Bar Association of San Francisco Opinion No. 1979-1; Cf. In re Primus, 436 U.S. at 435. However, it was disapproved in three cases: Allison v. Louisiana State Bar Association, 62 So.2d 489 (La. 1978); Kansas v. Moses, 642 P.2d 1004 (Kan. 1982); The Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1982). A mailing to a third party intermediary may lack first amendment protection, even where direct solicitation is protected. In re

^{*/} It should be noted that all of these cases predate R.M.J., and may be subject to further Supreme Court clarification.

Greene, 54 N.Y.2d 118, 444 N.Y.S.2d 883 (1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1738 (1982).

In State Bar of California Opinion No. 1980-54, the Standing Committee on Professional Responsibility and Conduct approved certain unsolicited letters offering professional services. The State committee took the following position.

[T]he determination of whether the letter is an allowed advertisement or a prohibited solicitation will turn on whether the services are offered (a) with respect to a potential legal problem which may be common to many of the parties to whom the letter is directed, but which does not, as yet, exist (which would be permitted) or (b) with respect to a particular existent case or matter which involves, or which may eventually involve, the individual solicited (which would not be allowed).

While the State committee draws a line that may have merit, there is no persuasive argumentation in its opinion, and this Committee perceives none, to support a prediction that a California court would adopt the same position.

Apart from the foregoing ethics opinions of the State Bar and the Bar Association of San Francisco, we are aware of no California authority on the constitutionality of the direct mail solicitation of clients. The conflicting cases in other jurisdictions make it difficult to predict the outcome of a judicial decision on this issue in California. If such solicitation does not enjoy constitutional protection, it is prohibited by Rule 2-101(B).

5. Personal Solicitation

Personal solicitation, whether face to face or by telephone, is also covered by the peculiar language of Rule 2-101(B), and is prohibited unless it is constitutionally protected.

Unlike advertising, personal solicitation is not visible or otherwise open to public scrutiny. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 466 (1978). Cf. In re Primus, 436 U.S. at 435-436. Often there is no witness other than the lawyer and the lay person whom he has solicited, making it difficult or impossible to obtain reliable proof of what actually takes place. Such solicitation can involve invasion of privacy or overbearing persuasion. In consequence, two courts have imposed discipline for personal solicitation of clients where no other

factors were involved. See In re Teichner, 75 Ill.2d 88, 387 N.E.2d 265 (1979), cert. denied, 444 U.S. 917 (1979); In re Carroll, 124 Ariz. 80, 602 P.2d 461 (1979).

Personal solicitation of business through an agent is prohibited by California Business Professions Code §§ 6150-6154. Section 6152(a)(1) prohibits any person from acting as a runner or capper for an attorney. Section 6151(a) defines a runner or capper as any person or firm acting in any manner or capacity as an agent for an attorney in the solicitation of business. This rule apparently satisfies the requirements of Central Hudson Gas: A less restrictive alternative is not available, because the runner or capper is not subject to the Rules of Professional Conduct, and he cannot be disciplined thereunder. The California Supreme Court recently disbarred an attorney for capping. See 2 Cal. Lawyer 45 (May, 1982). However, where a non-attorney refers clients without a promise of compensation or reward, such activity is protected by the first amendment. In re Appert, 315 N.W.2d 204 (Minn. 1981); Cf. Rule 3-102.

Pursuant to Rule 2-101(D), the Board of Governors of the State Bar has adopted a presumption that the following kinds of solicitation are improper: Advertising or solicitation delivered to a person in such a physical, emotional or mental state that he would not be expected to

exercise reasonable judgment as to the retention of counsel; advertising or solicitation delivered at the scene of an accident or en route to a health care facility. These rules appear justified, because a less restrictive alternative is not available.

Indeed, the United States Supreme Court went somewhat further in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), where it upheld the imposition of discipline on an attorney, who had found one prospective client in traction in a hospital and the second on the day that he knew that she had just been released from the hospital, and who had subsequently refused to withdraw upon request. The Supreme Court noted that the potential for overreaching is significantly greater when a lawyer, as a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person, id. at 465, and that under the adverse conditions of the case it was not unreasonable for the state to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

In In re R.M.J., ____ U.S. ____, 102 S.Ct. 929 (1982), the Supreme Court appears to state that Ohralik authorizes the prohibition of all in-person solicitation. ____ U.S. at ____, 102 S.Ct., at 937. However, the holding of Ohralik does not go that far.

The Committee believes that, in a proper case, the constitutional protection for certain kinds of personal solicitation of business by attorneys can be established. However, it is not at the present time able to identify the scope or limits of such authorized solicitation in the absence of guiding precedent, and in view of the language of the Supreme Court in In re R.M.J. The structure of Rule 2-101(B) is such that it prohibits personal solicitation by attorneys unless such solicitation enjoys constitutional protection.

This Committee believes that telephone solicitation is governed by the same standards as in-person solicitation. See, e.g., standard (3) adopted by the Board of Governors of the State Bar, effective May 5, 1979. While it may be argued that telephone solicitation is not so obtrusive, because the recipient can always hang up, the improper use of telephone solicitation techniques in other businesses are well known.

This opinion is advisory only. The Committee acts only on special questions submitted ex parte, and its opinions are based on such facts only as are set forth in the questions presented.

405

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In *In re R.M.J.*, --- U.S. ---, 102 S.Ct. 929 (1982), the Supreme Court appears to state that *Ohrlik* authorizes the prohibition of all in-person solicitation. --- U.S. at ---, 102 S.Ct. at 937. However, the holding of *Ohrlik* does not go that far.

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*It should be noted that all of these cases predate *R.M.J.*, and may be subject to further Supreme Court clarification.

Opinion No.405 (November 17, 1982)

ATTORNEY AND CLIENT - Where client is to follow attorney moving from one law firm to another, prior law firm may retain files until it receives written notice from the client, providing that the files are made available to the departing attorney in the interim. The prior law firm may copy the files before transmitting them. It is improper for the departing attorney to remove client files prior to written notification by the client.

Authorities Cited:

Formal Opinion Nos. 197 and 330; *Weiss v. Mar-*

cus, 51 Cal.App.3d 590 (2d Dist. 1975)

Our opinion has been requested with respect to the following facts:

Law firm A was informed by an associate that he was resigning from the firm to accept employment with law firm B. At the same time, the attorney informed law firm A that two clients that he had brought to the firm during the course of his employment would be going with him to law firm B. The attorney removed the files relating to these two clients from the offices of law firm A without its consent, and refused to return them pending the receipt of written instructions from the client to transfer them to law firm B.

Law firm A has asked our opinion on two issues: (1) Was it unethical for the attorney to remove the files before the firm received notice from the clients as to their wishes; (2) Is law firm A entitled to receive the original files back so that it may retain materials that do not belong to the clients, and copy materials to be forwarded.

The disposition of clients when an attorney, whether partner or associate, leaves a law firm is a delicate matter that, in the final analysis, must turn on the desires of the client. Accordingly, the client's interests must be given the greatest weight in the resolution of the above questions.

When an attorney (whether partner or associate) leaves a law firm, the clients for whom that attorney has performed services will often continue to be represented by the firm, and the files relating to the representation will likewise remain with the firm. If, on the contrary, the client directly informs a law firm that it desires the departing attorney to continue the representation, the law firm is then relieved of further responsibility relating to the representation, and the files should go with the departing attorney. The law firm, however, may make copies of whatever documents it desires to retain for its own files.

Problems arise principally in circumstances such as that presented here, where it is the departing attorney who informs the law firm that the client's representation will be continued by him. Until the client informs the law firm directly of his wishes, both law firm A and the departing attorney have continuing duties with respect to the representation of the client. However, normally the files can only be in possession of law firm A or of the departing attorney. This Committee is of the opinion that in the normal case, law firm A should retain the files until it receives written notice from the client that the client desires the departing attorney to continue the representation. During the interim, however, the files should be made available to the departing attorney to enable him to discharge his duties with respect to the client.

In such circumstances both sides have an obligation to plan for an orderly transition resulting from the departure of the attorney from the law firm. For example, both sides have an obligation to see that the client is contacted at the earliest practical time, so that the client's desires will be communicated to all interested parties. If the client responds that he wants the departing attorney to continue to handle his representation, law firm A should make every effort to assure that the entire

files are transferred to law firm B at the earliest opportunity. However, the Committee believes it appropriate for law firm A to expect the client to express his wishes in writing before releasing custody of the files.

The foregoing principles permit responses to the questions posed. Absent unusual circumstances, it was improper for the attorney to remove the files from law firm A before it received direct communication from the client as to his wishes for his continued representation.

Law firm A is entitled to receive copies of the files, but it is doubtful that it is entitled to receive the original files back. Prior opinions of this Committee authorize a law firm, when a client has chosen to substitute another lawyer, to retain documents in a client's file that do not belong to the client. See Opinions 197 and 330. However, this Committee believes that, in most cases, virtually everything in a client's file is the property of the client, because it either has been copied at client expense, or the time utilized to create it has been at client expense. *Weiss v. Marcus*, 51 Cal.App.3d 590, 599 (2d Dist. 1975); Opinion No. 330. Thus, in the typical case, a law firm should forward its entire file to its successor, and may retain for its own purposes copies of whatever it desires from the file.

Opinion No. 406 (November 17, 1982)

ADVERSE INTERESTS. An attorney may represent a client in a dispute with a former client no longer represented by the attorney, so long as the attorney obtained no confidential information as a result of the representation of the former client relating to the matter for which he was retained by the new client, and provided the present client gives written consent to the attorney's employment after being informed of the attorney's representation of the former client.

Authorities Cited:

California Rules of Professional Conduct 4-101, 5-102.

The Committee's opinion has been requested concerning the ethical propriety of an attorney representing a new client defending against the debt collection efforts of a former client. The former client was represented by the attorney in connection with unrelated debt collection matters. The attorney no longer has any attorney-client relationship with the former client and obtained no confidential information during the representation of the new client.

Two rules of professional conduct govern the ethical question presented. Rule 4-101 provides that an attorney shall not accept employment adverse to a former client relating to any matter in reference to which the attorney has obtained confidential information by reason of the employment. The inquiring attorney has indicated that no confidential information was obtained in the prior representation relating to the matter which is the subject of the new representation.

Rule of Professional Conduct 5-102(A) provides as follows:

"A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party . . . A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment."

Because of the attorney's prior representation of the adversary of his new client, Rule 5-102 mandates that the attorney disclose the fact of the prior representation to the new client and obtain the new client's written consent to the attorney's employment prior to accepting such employment.

Opinion No. 407 (November 17, 1982)

SECURITY FOR FEES; SUIT FOR FEES. A

Member of the State Bar shall not knowingly acquire a security interest adverse to a client unless the transaction has been fully disclosed to the client in writing thereto. An attorney may bring a suit for fees against a client only after termination of the attorney-client relationship.

Authorities Cited:

California Rules of Professional Conduct 5-101, 8-101; Formal Opinion 212.

The Committee's opinion has been requested concerning the following circumstances. A client was referred to an attorney in a criminal matter and the attorney performed 22 hours of service on the client's behalf. The client then obtained other counsel. The client gave to the attorney a white mink jacket as collateral to secure a fee for the work performed by the attorney. The client subsequently had no contact with the attorney, refuses to pay the bill and fails to respond to the attorney's attempts to communicate by letter and telephone. The attorney has inquired as to the ethical propriety of selling the fur coat and suing the client for the balance of the fee due.

Rule 5-101 of the California Rule of Professional Conduct provides that a member of the State Bar shall not knowingly acquire a security interest adverse to a client unless

"(1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto."

In the situation presently before this Committee, the mink coat, if given as security for the payment of fees as distinguished from given in lieu of fees, was obtained by the attorney without adherence to the requirements of Rule 5-101 in that the terms of the transaction be set forth in writing and that the client consent in writing to the transaction. Whether or not the client is estopped to deny

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 406

(November 17, 1982)

ADVERSE INTERESTS. An attorney may represent a client in a dispute with a former client no longer represented by the attorney, so long as the attorney obtained no confidential information as a result of the representation of the former client relating to the matter for which he was retained by the new client, and provided the present client gives written consent to the attorney's employment after being informed of the attorney's representation of the former client.

AUTHORITIES CITED:
California Rules of
Professional Conduct
4-101, 5-102.

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This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and its opinions are based only on the facts set forth and the questions presented.

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an understanding of the terms of the transaction and its fairness is a question of law on which this Committee cannot render an opinion.

Once in the attorney's possession, however, the mink coat and disposition thereof would, insofar as ethical questions are concerned, be governed by Rule 8-101 of the California Rules of Professional Conduct dealing with property of a client in the hands of an attorney. Rule 8-101 provides that no property belonging to a client may be withdrawn or converted to the personal use of the attorney so long as the client disputes the right of the attorney to that property. In the present situation, ethical propriety would require the attorney to obtain the written consent of the former client to the sale or retention by the attorney of the fur coat in full or part payment of legal fees, or the coat should be retained, in trust, by the attorney, pending resolution of any fee disputes between the attorney and the client.

Once the attorney-client relationship has terminated either by the attorney's withdrawal or substitution out of the matter, the attorney is ethically free to file suit against the former client for attorney's fees. (Opinion 212.) Because the client has obtained counsel and, presumably, terminated the attorney-client relationship with the inquiring attorney, a suit may be commenced for fees claimed to be due. In connection with that suit, the attorney may deposit the fur coat into court or retain it in trust pending the outcome of that dispute.

Opinion No. 408 (December 15, 1982)

CONFIDENTIAL INFORMATION - Representation of a suspended corporation. An attorney may represent a corporation which has been "suspended" pursuant to Section 23301 of the Revenue and Taxation Code, but may not mislead the court with respect to the status of the corporation.

Authorities Cited:

California Revenue and Taxation Code, Section 23301 and Section 25962.1; California Rules of Professional Conduct, Rule 7-105.

A law firm has been retained by an insurer of a corporation, to represent the interests of the corporation in litigation which has been filed against said corporation. The corporation has been "suspended" for nonpayment of taxes pursuant to California Revenue and Taxation Code, Section 23301. The Revenue and Taxation Code, Section 25962.1 states: "Any person who attempts or purports to exercise the powers, rights and privileges of a bank or corporation which has been suspended pursuant to Section 23301 ... is punishable by a fine of not less than two hundred and fifty dollars (\$250.00) and not exceeding one thousand dollars (\$1,000.00) or by imprisonment not exceeding one year, or both fine and imprisonment." The question asked: "Is an attorney who attempts to protect the interests of the suspended corporation acting in violation of Revenue and Taxation Code, Section

408

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259632.1, and exposing himself to the penalties contained therein?"

The question, as phrased, involves a legal interpretation. Whether a Revenue and Taxation Code section applies to an attorney's conduct is not an ethical question within the authority of this committee. Therefore, we interpret the question to be whether it would be a violation of an attorney's ethical responsibilities to undertake the defense of such a corporation in a lawsuit.

We conclude that it would not be unethical to represent the suspended corporation if the attorney does not mislead the tribunal or the parties as to the status of the corporation.

Rule 7-105 of the California Rules of Professional Conduct states "In presenting a matter to a tribunal, a member of the State Bar shall: (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law..."

So long as this rule is complied with, there should be no ethical breach by representing the corporation's rights. While the courts should not be deceived as to the status of the corporation, an attorney is able ethically to represent the corporation in any manner available, including by challenging interpretations of the applicable suspension statutes.

Opinion No. 409 (February 7, 1983)

PRESERVATION OF CONFIDENTIAL INFORMATION; ADVERSE INTERESTS: An attorney representing the defendant in a pending criminal case may communicate confidential information about the case to entertainment industry representatives only with the client's consent. DR 5-101 should be complied with before obtaining such consent if the attorney is considering any type of agreement under which he would receive compensation for information communicated to such industry representatives.

Authorities Cited:

California State Bar Act, Business and Profession Code, Section 6068(e)
California Rules of Professional Conduct, Rules 4-101, 5-101, 5-102, 6-101
ABA Canon 4, DR 4-101, Canon 5, DR 5-101
Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934
Maxwell v. Superior Court (1982) 30 Cal. App. 3d 606
People v. Corona (1978) 80 Cal. App. 3d 684
Yorn v. Superior Court (1979) 90 Cal. App. 3d 669

The Committee's opinion has been requested concerning the ethical propriety of communications with entertainment industry representatives by a Los Angeles Deputy Public Defender representing a defendant charged with a serious felony in a case presently being tried in the Los Angeles Coun-

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 409

LOYOLA LAW SCHOOL (FEBRUARY 17, 1983)

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California State Bar Act, Business and Professions Code, Section
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representing a defendant charged with a serious felony in a case presently being tried in the Los Angeles County Superior Court. The case has attracted considerable media attention, and both the defendant and his attorney have been contacted by entertainment industry representatives expressing interest in a dramatic treatment of the case, including the alleged offenses and the trial itself. The defendant apparently admits committing the alleged criminal acts, but is asserting a "psychiatric defense," claiming he lacked the requisite criminal intent at the time the acts were committed. The defendant has not, however, asserted the defense of not guilty by reason of insanity.

The attorney, while not intending to discuss the matter with media representatives during the trial, has inquired as to his ethical obligations concerning such communications after the trial has ended. The attorney has expressed the concern that if neither he nor his client communicate with the producers of a dramatic representation of the case, his client may be placed in an even more unfavorable light than if the attorney or the client disclosed certain information to such producers. The attorney further advises that, while there has as yet been no discussion of compensation of either the lawyer or the client for information communicated to entertainment industry representatives, such compensation might in the future be offered. The attorney requested that the Committee advise concerning any ethical obligations relating to such compensation.

An attorney has both a duty of loyalty to his client and a duty not to disclose confidential information learned by the attorney in the course of his representation. Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 945 (1979); Yorn v. Superior Court, 90 Cal. App. 3d 669, 675 (1979). Section 6068 of the Business and Professions Code provides that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself preserve the secrets, of his client." Both the duty of loyalty and the duty to maintain client confidences remain after termination of the attorney-client relationship. Rule of Professional Conduct, Rule 4-101; ABA EC 4-6. In Yorn v. Superior Court, supra, the court stated:

"Few percepts are more firmly entrenched than that the fiduciary relationship between attorney and client is of the very highest character [citations] and, even though terminated, forbids (1) any act which will injure the former client in matters involving such former representation or (2) use against the former client of any information acquired during such relationship."
90 Cal. App. 3d at 675.

On the other hand, confidential information acquired by the attorney may be disclosed by the attorney if the client consents. Rule of Professional Conduct, Rule 4-101; Commercial Standard Title Co. v. Superior Court, supra, at 945.

An attorney may acquire a pecuniary interest adverse to a client only upon complying with the disclosure, fairness and consent requirements of Rule 5-101.

Applying these principles to the assumed facts, the Committee believes that defense counsel in a criminal case may disclose confidential information about the matter to entertain-^{1/}ment industry representatives under the following conditions:

(1) The disclosure of confidential information to entertainment industry representatives should be made only with the client's informed consent. In order for the client's consent to be "informed," the attorney should fully disclose to the client the nature of the proposed communications with entertainment industry representatives, the purpose of the disclosures, the benefits and detriments to the client, both legal and otherwise, which might result from such disclosures, whether the attorney is to be compensated for such disclosures (see further discussion in Part (2) below), and any other specific facts which could have an important bearing on the client's decision. Although no Rule of Professional Conduct specifically so requires, the Committee believes it is advisable for both the attorney's advice and client's consent to be in writing. Such written consent is, for example, required by Rule 4-101 allowing representation adverse to a client only with the client's informed,

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This opinion is concerned only with counsel's communications with entertainment industry representatives about a film or other dramatic treatment of the case. The opinion does not deal with communications by or on behalf of the defendant with the press or other public media during the course of the trial.

written consent. (Since the attorney is presenting a "psychiatric defense" at trial, he should also bear in mind the client's mental state at the time such consent is given, creating a risk that the consent might be incompetently given.)

(2) If the attorney expects to be compensated or otherwise benefit financially from the disclosures, Rule of Professional Conduct 5-101 comes into play, providing:

"A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto."

Recent appellate decisions have emphasized that a criminal defense attorney's acquisition of a financial interest adverse to the client may not only violate the Rules of Professional

Conduct, but result in a finding that the defendant was deprived of the constitutionally guaranteed "effective assistance of counsel." See, e.g., People v. Corona (1978) 80 Cal. App. 3d 684; Maxwell v. Superior Court (1982) 30 Cal. 3d 606. In each of these cases, defense counsel, prior to trial, obtained exclusive literary and dramatic property rights to the defendant's "life story." In Corona, the Court held that counsel's acquisition of this adverse financial interest, together with counsel's trial tactics aimed at furthering these interests (e.g., by generating sensational trial publicity) deprived defendant of the effective assistance of counsel, resulting in a reversal of his conviction. In Maxwell, the Court refused to disqualify counsel prior to trial merely because such a "life story" agreement had been entered into, where the consent of the client had been obtained after extensive disclosure of the risks inherent in such an agreement.

While the public defender in the present situation has not entered into any such "life story" agreement with the defendant-client, the Committee believes that receiving compensation for disclosing client confidences would constitute the acquisition of a "pecuniary interest adverse to the client" triggering the disclosure and consent requirements of Rule 5-101, as well as the substantive standard that the transaction be "fair and reasonable to the client." (See also ABA DR 4-101(B), which provides that a lawyer shall not knowingly "use a confidence or secret of his client for the advantage of himself or a third

person, unless the client consents after full disclosure.") If the attorney anticipates receiving any compensation for communications with entertainment industry representatives relating to this matter, he should take seriously Rule 5-101's admonition that the client must be given a "reasonable opportunity to seek the advice of independent counsel." Since the client may well be in a position to enter into an advantageous financial arrangement with media representatives, the attorney may be placed in a position where he is tempted to benefit himself financially at the expense of his client, precisely the danger Rule 5-101 is intended to meet.

The attorney should also follow any rules applicable to employees of the Public Defender's Office concerning receipt of compensation or financial benefits relating to matters within the scope of the attorney's work for the Office. The substance of any such rule is beyond the scope of this opinion.

This opinion is advisory only. The Committee acts only on special questions submitted ex parte, and its opinions are based on the facts set forth and the questions presented.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 410

(March 24, 1983)

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EX PARTE COMMUNICATIONS WITH EMPLOYEES OF A CORPORATION BY OPPOSING COUNSEL -- It is not proper for opposing counsel or its investigator to contact ex parte an employee of a corporation that is a party to a suit knowing that the information sought from the employee relates to a subject of controversy.

AUTHORITIES CITED:

California Rules of Professional Conduct: Rule 7-103; ABA Code of Professional Responsibility: DR 7-104, EC 4-1; Los Angeles County Bar Informal Opinion 1976-1; Los Angeles County Bar Formal Opinion 369; Upjohn v. United States, 449 U.S. 383, 393 (1981); D.I. Chadbourne, Inc. v. Superior Court, 36 Cal Rptr. 468, 477 (1964); U.S. v. Nobles, 422 U.S. 225, 236-240; Hickman v. Taylor, 329 U.S. 495, 511 (1947); F.R.C.P. 26(6)(3); Calif. Evid. Code §1222; Federal Rules of Evidence Rule 801(d)(2).

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The Committee has been asked to review the propriety of an opposing counsel or his investigator making ex parte contacts with employees of a party corporation represented by counsel when the employees are not members of the control group of the corporation.

The Committee has been specifically asked to re-evaluate its Informal Opinion 1976-1, which, in essence, sanctioned such ex parte contacts, in light of a recent decision of the United

States Supreme Court which held the "control group test" was inapplicable in determining whether certain communications between the corporate party's general counsel and its non-control group employees were protected under the work product rule and the attorney-client privilege. Upjohn v. United States, 449 U.S. 383, 393 (1981).

It is well established that an attorney should avoid ex parte contacts with an opposing party that is represented by counsel. Calif. Rule of Professional Conduct 7-103, provides:

"A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body."

See also ABA Code of Professional Responsibility 7-104.

When an individual is a party, compliance is easy. However, when the party is a corporation, compliance is more complex.

In Informal Opinion 1976-1 (Jan. 15, 1976), this committee found that it was proper for an adverse party through its lawyer or investigator to interview a "non-management" employee of a corporation represented by counsel.

In Formal Opinion 369 (Nov. 23, 1977), this committee found that the relevant test is the extent to which the employees are "closely, identified with management of the company".

(@ page 6).

We further advised that "In the case of such an employee (who for convenience will be referred to herein as a "controlling employee"), the right of the corporation to representation by counsel must prevail over the inquiring attorney's unrestricted access to officers and employees of the corporation." (@ page 8).

The Supreme Court in Upjohn held that a corporation and its employees generally should be treated as one and the same person for the purposes of the work product rule and the attorney-client privilege. 449 U.S. 383, 393 (1981).

The attorney-client privilege as applied to corporations is also extensively discussed in D.I. Chadbourne, Inc. v. Superior Court, 36 Cal. Rptr. 468, 477 (1964), where the California Supreme Court rejected an absolute rule, but rather listed eleven "basic principles" pursuant to which the attorney-client privilege either applies or doesn't apply.

Although Upjohn, is not controlling, it is certainly instructive as to whether or not the control group test should be rejected in determining which employees constitute the "corporate party". Its reasoning may be logically extended to ex parte contacts with a corporate party's employee by opposing counsel for at least four reasons.

First, the corporate employee may be prejudiced either directly or indirectly by the ex parte contact. Second, the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel. Third, due to the difficulty of ascertaining whether an employee

is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation. Fourth, due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party whom he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper.

An employee who makes a statement in the course or scope of employment may bind the corporation. California Evidence Code §1222. Such an admission might injure the corporation, and in turn, the employee by either harming the corporation itself and thereby endangering the employee's source of income or by jeopardizing the employee's position at the corporation. The obvious purpose of Rule 7-103 is to insure that lay persons are not injured by an attorney inducing an unsuspecting lay person to make damaging admissions. This purpose is furthered by prohibiting ex parte contacts with all employees of a corporate party since such contacts could possibly injure the employee.

The rule prohibiting ex parte contacts should be extended to all employees of a corporate party because opposing counsel could cause a lay employee to divulge information such as legal advice of corporate counsel, trade secrets, or information considered attorneys' work product. If that is possible, corporate counsel is placed at a severe disadvantage because he or she will not be able to give confidential advice to non-control group employees without the assurance that such information and advice would not be disclosed during an ex parte contact with opposing counsel. This

is precisely the issue that Justice Rehnquist addressed in this opinion in Upjohn when he stated, "the attorney and client must be able to predict with some degree of certainty whether certain discussions will be protected." 449 U.S. at 393.

Forbidding ex parte contacts by opposing counsel with the non-control group employees of a corporate party furthers the ends enunciated by Justice Rehnquist by assuring the corporation and its counsel that privileged information will not be inadvertently disclosed to opposing counsel through that counsel's superior training and skill. This furthers the policy of promoting frankness and candor between corporate employees and corporate counsel. See ABA code of Professional Responsibility, Ethical Consideration 4-1; United States v. Nobles, 422 U.S. 225, 236-240; Hickman v. Taylor, 329 U.S. 495, 511 (1947); F.R.C.P. 26(6)(3). This is especially true in light of the fact that many communications between corporate counsel and non-control group employees involve attempts to encourage faithful compliance with the law. Upjohn v. United States, supra at 392.

Under California Evidence Code Section 1222, an employee may bind a corporation by making admissions about acts or facts within the scope of his or her employment. See also Federal Rules of Evidence, Rule 801(d)(2). If any such admission is damaging to either the employee or the corporation the clear purpose of Rule 7-103 will be circumvented by an attorney who with his or her superior training and skill may cause an unwary corporate employee to make damaging revelations of privileged information.

The obvious rejoinder to this criticism is that as long

as the admission or statement is not within the scope of the employee's employment no harm can be done. This reasoning is flawed for the practical reason that it is difficult for an attorney or the employee to draw precisely the line between what is and what is not within the scope of the employee's employment. Moreover, even though the attorney might scrupulously avoid asking questions or soliciting information within the employee's scope of employment, the employee might nevertheless volunteer damaging or privileged information for which the opposing counsel had not asked which is within the scope of the employee's employment thereby binding the corporation. Certainly, no lay employee, especially an unsophisticated one, would be able to tell whether his or her statements are within the scope of his or her employment.

One of the reasons that the Supreme Court decided not to adopt the "control group test" in Upjohn v. U.S., supra, was that "[d]isparate decisions in cases applying the test illustrate its unpredictability." 449 U.S. at 393. The Committee believes that the unpredictability of the test places opposing counsel in a very difficult situation. If an attorney contacts the employee of a corporate party believing that the employee is not a control group member and it is later determined that the employee is a member of the control group, the attorney has inadvertently violated Rule 7-103 and could be subject to discipline. Moreover, corporate counsel must be able to determine with certainty that communications to employees which he or she may make will not be divulged to the opposing counsel.

Therefore, in order to promote candor and frankness between counsel and client, corporate counsel must know if the

person to whom he or she speaks is a member of the control group. Since, this can not be accurately determined in advance, it is best to draw a clear and unequivocal line -- opposing counsel should not have ex parte contacts concerning a subject of controversy with the employees of a corporate party to the controversy. This promotes the confidentiality of corporate counsel's advice and assures opposing counsel that he or she is not making potentially improper contacts with the opposing party.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the question submitted.

Opinion 411

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Opinion No. 411 (April 20, 1983)

COMMUNICATION WITH ADVERSE PARTY. An attorney should not communicate with an adverse party without the express consent of the adverse party's attorney in connection with matters previously litigated where the parties remain adverse with respect to the prior litigation or where rights and liabilities of the adverse party may be affected.

AUTHORITIES CITED:

Rule 7-103;
Code of Civil Procedure, §§283, 284; and
Los Angeles County Bar Opinion Nos. 213, 334.

The Committee's opinion has been requested on the ethical propriety of an attorney communicating directly with a non-attorney under the following circumstances:

The inquiring attorney represented plaintiff and cross-defendant in an action brought against two individual defendants and cross-complainants. After trial, judgment was entered for plaintiff and became final. Plaintiff's attorney negotiated an agreement with one of the two defendants (the "settling defendant") providing for payment of a monthly amount toward the judgment in consideration of an agreement by plaintiff not to execute against that defendant on the entire judgment. The settling defendant is continuing to make payments in accordance with the agreement.

Plaintiff is considering bringing a malicious prosecution action against the defendant's attorney in the prior litigation. In order to discover facts relevant to a malicious prosecution action, the inquiring attorney desires to interview the settling defendant without the knowledge of the settling defendant's attorney against whom the malicious prosecution action may be brought.

It is ethically improper for plaintiff's attorney to communicate directly with the settling defendant in connection with the contemplated malicious prosecution action. Rule 7-103 proscribes a member of the state bar from communicating with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. Although the prior litigation may have proceeded to final judgment, this does not necessarily mean that the facts of that litigation are no longer a subject of controversy within the meaning of Rule 7-103. Because the judgment has not yet been paid, a satisfaction of judgment, presumably, has not been entered, and the inquiring attorney is clearly continuing to represent the plaintiff in connection with the matter which went to litigation by virtue of the continuing collection effort. Continuing representation for collection is specifically recognized by statute. Ca. Code of Civil Procedure §283. Similarly, the circumstances related to this committee do not suggest that the settling defendant's attorney has ceased to represent that defendant in connection with any matters regarding the litigation. The entry of final judgment in an action does not *ipso facto* terminate the attorney-client relationship. See Code of Civil Procedure 284.

Although the contemplated communication with the settling defendant is with regard to the bringing of another action, it is closely related to the facts underlying the matter which was in controversy in the litigation. Accordingly, it would be ethically inappropriate for plaintiff's attorney to

communicate with the settling defendant without the express consent of the settling defendant's attorney.

In addition, although the inquiring attorney states that the malicious prosecution action is being contemplated only against the settling defendant's attorney, an investigation of the facts underlying the terminated litigation could not eliminate the possibility that the communication may involve matters affecting the rights and liabilities of the settling defendant. So long as such possibility exists, plaintiff's attorney should not communicate with the settling defendant in any manner without the express consent of his attorney. See Opinion Nos. 213, 334.

Opinion No. 412 (May 18, 1983)

CONFLICT OF INTEREST. It is a conflict of interest for an attorney to represent a party in a lawsuit against another party, where the attorney at the same time is legal counsel to a joint venture in which these two parties are joint venturers.

AUTHORITIES CITED:

Rule 5-102(B)
Jeffry v. Pounds, 67 Cal.App.3d 6 (3d Dist. 1977)
Philadelphia Housing Authority v. American Radiator,
294 F.Supp. 1148 (E.D. Pa. 1969)
Schwartz v. Broadcast Music, 16 F.R.D. 31
(S.D.N.Y. 1954)
United States v. American Radiator, 278 F.Supp. 608
(W.D. Pa. 1967)

A law firm is counsel for plaintiff in an action brought to rescind a joint venture agreement between plaintiff and defendants. The joint venture owns and operates a shopping center. The law firm also represents the shopping center in a variety of matters, including an unlawful detainer action against the purported assignee of a tenant in the shopping center. In addition, the defendants received their copy of the 1041 tax return for the joint venture from the law firm.

This Committee has been asked whether the law firm's representation of plaintiff in the lawsuit against his co-venturers while representing the shopping center is a conflict of interest.

Rule 5-102(B) of the California Rules of Professional Conduct provides: "A member of the state bar shall not represent conflicting interests without the written consent of all parties concerned." See, also, Jeffry v. Pounds, 67 Cal.App.3d 6, 403d Dist. 1977. It is undisputed in this case that the defendants have not consented to any conflicting representation by the law firm.

The simultaneous representation of the shopping center and of plaintiff in an action against his co-venturers is the representation of conflicting interests. The law firm's representation of the joint venture is the representation of the venture's, including defendants. A joint venture is not like a corporation, which has a separate corporate identity that can be represented independently of its shareholders: each member of the association is a client of the association's lawyer. Philadelphia Housing Authority v. American Radiator, 294 F.Supp. 1148, 1150 (E.D. Pa. 1969); United States v. American Radiator, 278 F.Supp. 608, 614 (W.D. Pa. 1967); Schwartz v. Broadcast Music, 16 F.R.D. 31, 32 (S.D.N.Y. 1954). Thus, in this Committee's opinion,

Opinion H12



Opinion No. 411 (April 20, 1983)

COMMUNICATION WITH ADVERSE PARTY. An attorney should not communicate with an adverse party without the express consent of the adverse party's attorney in connection with matters previously litigated where the parties remain adverse with respect to the prior litigation or where rights and liabilities of the adverse party may be affected.

AUTHORITIES CITED:

Rule 7-103;
Code of Civil Procedure, §§283, 284; and
Los Angeles County Bar Opinion Nos. 213, 334.

The Committee's opinion has been requested on the ethical propriety of an attorney communicating directly with a non-attorney under the following circumstances:

The inquiring attorney represented plaintiff and cross-defendant in an action brought against two individual defendants and cross-complainants. After trial, judgment was entered for plaintiff and became final. Plaintiff's attorney negotiated an agreement with one of the two defendants (the "settling defendant") providing for payment of a monthly amount toward the judgment in consideration of an agreement by plaintiff not to execute against that defendant on the entire judgment. The settling defendant is continuing to make payments in accordance with the agreement.

Plaintiff is considering bringing a malicious prosecution action against the defendant's attorney in the prior litigation. In order to discover facts relevant to a malicious prosecution action, the inquiring attorney desires to interview the settling defendant without the knowledge of the settling defendant's attorney against whom the malicious prosecution action may be brought.

It is ethically improper for plaintiff's attorney to communicate directly with the settling defendant in connection with the contemplated malicious prosecution action. Rule 7-103 proscribes a member of the state bar from communicating with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. Although the prior litigation may have proceeded to final judgment, this does not necessarily mean that the facts of that litigation are no longer a subject of controversy within the meaning of Rule 7-103. Because the judgment has not yet been paid, a satisfaction of judgment, presumably, has not been entered, and the inquiring attorney is clearly continuing to represent the plaintiff in connection with the matter which went to litigation by virtue of the continuing collection effort. Continuing representation for collection is specifically recognized by statute. Ca. Code of Civil Procedure §283. Similarly, the circumstances related to this committee do not suggest that the settling defendant's attorney has ceased to represent that defendant in connection with any matters regarding the litigation. The entry of final judgment in an action does not ipso facto terminate the attorney-client relationship. See Code of Civil Procedure 284.

Although the contemplated communication with the settling defendant is with regard to the bringing of another action, it is closely related to the facts underlying the matter which was in controversy in the litigation. Accordingly, it would be ethically inappropriate for plaintiff's attorney to

communicate with the settling defendant without the express consent of the settling defendant's attorney.

In addition, although the inquiring attorney states that the malicious prosecution action is being contemplated only against the settling defendant's attorney, an investigation of the facts underlying the terminated litigation could not eliminate the possibility that the communication may involve matters affecting the rights and liabilities of the settling defendant. So long as such possibility exists, plaintiff's attorney should not communicate with the settling defendant in any manner without the express consent of his attorney. See Opinion Nos. 213, 334.

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(W.D. Pa. 1967)

A law firm is counsel for plaintiff in an action brought to rescind a joint venture agreement between plaintiff and defendants. The joint venture owns and operates a shopping center. The law firm also represents the shopping center in a variety of matters, including an unlawful detainer action against the purported assignee of a tenant in the shopping center. In addition, the defendants received their copy of the K-1 tax return for the joint venture from the law firm.

This Committee has been asked whether the law firm's representation of plaintiff in the lawsuit against his co-venturers while representing the shopping center is a conflict of interest.

Rule 5-102(B) of the California Rules of Professional Conduct provides: "A member of the State Bar shall not represent conflicting interests without the written consent of all parties concerned." See, also, Jeffry v. Pounds, 67 Cal.App.3d 6, 40 (3d Dist. 1977). It is undisputed in this case that the defendants have not consented to any conflicting representation by the law firm.

The simultaneous representation of the shopping center and of plaintiff in an action against his co-venturers is the representation of conflicting interests. The law firm's representation of the joint venture is the representation of the venturers, including defendants. A joint venture is not like a corporation, which has a separate corporate identity that can be represented independently of its shareholders: each member of the association is a client of the association's lawyer. Philadelphia Housing Authority v. American Radiator, 294 F.Supp. 1148, 1150 (E.D. Pa. 1969); United States v. American Radiator, 278 F.Supp. 608, 614 (W.D. Pa. 1967); Schwartz v. Broadcast Music, 16 F.R.D. 31, 32 (S.D.N.Y. 1954). Thus, in this Committee's opinion,

the law firm has a conflict of interest in representing the joint venture at the same time that it is prosecuting a lawsuit on behalf of one of the venturers against another venturer.

Whether the law firm has received confidential information from the defendants is irrelevant to this determination. The basis for the prohibition lies in an attorney's duty of loyalty to his client, and is not limited to circumstances where confidential communications may be disclosed. Jeffry, supra, 67 Cal.App. at 11. A client is likely to doubt the loyalty of an attorney who undertakes an inconsistent representation. Id. For this reason, such representation is prohibited.

Opinion No. 413 (August 17, 1983)

DUAL PRACTICE. An attorney may ethically conduct a business under a trade name which provides both brokerage and legal services for buyers in real estate transactions, and which employs non-attorney brokers who perform brokerage activities only, so long as the attorney complies at all times with the Rules of Professional Conduct.

AUTHORITIES CITED:

California Rules of Professional Conduct Rules 2-101, 2-107, 2-108, 2-103(B), 3-101, 3-102, 3-102(A), 3-103, 4-101, 5-102, 5-102(A);
California Business & Professions Code
Section 10153.4, Section 6068(e);
State Bar Opinions 1982-69, 1979-4;
LACBA Opinion 384;
Informal Opinion 1979-4, 404 and
Watt Industries v. Superior Court, 115 Cal.App.3d 802 (1981).

The Committee's opinion is requested concerning the ethical propriety of an attorney acting in the dual capacities of real estate broker and attorney under the following circumstances:

(1) The attorney would form a non-law partnership, ABC Realty Co., whose members would all be lawyers.

(2) ABC Realty Co. would employ mass advertising to promote its services. The advertising would state that ABC would provide both legal and brokerage services in connection with real estate transactions for the price of an usual brokerage commission.

(3) ABC would refer the brokerage services to independent brokers; the legal work would be referred to either (a) a law partnership consisting of the same partners as ABC Realty; or (b) an independent law firm.

(4) The commission earned by ABC Realty would be split into two components: a brokerage and a non-brokerage component. The brokerage component would be paid to the broker and, with one exception, would be a fixed percentage of the commission earned by ABC; the non-brokerage component would be used by ABC to pay the fees of the law firm that provided legal services.

Legal fees would be billed at an hourly rate. If the amount billed for legal services was less than the non-brokerage component of the commission received by ABC, ABC would retain the excess as profit; if the amount billed for the legal services exceeded the non-brokerage

component, the fee paid to the broker would be reduced as necessary to allow payment of all legal fees.

(5) Under no circumstances would legal services be provided for both a buyer and a seller in the same transaction. ABC Realty will represent only prospective buyers of property.

(6) All brokers to whom work is referred by ABC Realty will be required by contract to maintain the confidentiality of all customer files and otherwise act in accordance with the Rules of Professional Conduct. The non-lawyer brokers will be prohibited by contract from providing legal advice. No legal services will be provided for clients solicited by the affiliated brokers.

(7) The inquiry also asks whether the conclusion of the Committee would be different if ABC Realty Co. rendered the legal services directly to the buyer.

While it is the conclusion of the Committee that, with the qualifications stated below, a lawyer may ethically act in the dual capacities of broker and attorney in the circumstances described above, it is the opinion of the Committee that there are significant inherent risks of ethical impropriety in the above arrangement which require the lawyer to continuously and scrupulously monitor both his own conduct and that of his employees to insure that the Rules of Professional Conduct are observed. Moreover, the lawyer is bound to observe the standards of those rules both when he acts as an attorney and as a broker.

Many of the concerns raised by this inquiry are addressed by ethics opinions of this Committee and by the opinions of State Bar Committee on Professional Responsibility and Conduct. To the extent that previous opinions have squarely addressed issues raised by this inquiry, the rationale of those opinions will be referred to in summary fashion. However, the Committee notes that both its opinions and those of the State Bar have expressed serious reservations concerning dual practice in the real estate context and have admonished lawyers who seek to engage in such a practice that the inherent potential for ethical impropriety may render dual practice unworkable as a practical matter.

Before turning to the specific business structure proposed by the Inquiry, it can be noted in general that a lawyer may ethically engage in two professions and may practice both professions from a single office. See L.A. County Bar Opinion No. 384. State Bar Opinion No. 1982-69. California Business & Professions Code Section 10153.4 implicitly recognizes that a lawyer may properly engage in a second profession as a real estate broker since that section requires an applicant for a broker's license to complete a course in real estate law unless he is a member of the State Bar. See State Bar Op. No. 1982-69. The former prohibition in Rule 2-103(B) against the use of trade names has been repealed. The current limitations on the use of trade names are contained in Business & Professions Code Section 6164 (law corporations) and in Rule 2-101, which prohibits communications that are false, deceptive, or which tend to confuse, deceive or mislead the public. Firm names are considered to be communications within the meaning of 2-101. See L.A. County Bar Informal Opinion No. 1979-4.

Similarly, use of mass advertising to promote the service must be carried out in compliance with the provisions of Rule 2-101. See generally L.A. County Bar Opinion No. 404. In addition to prohibiting false or misleading advertis-

OPTION 413

the law firm has a conflict of interest in representing the joint venture at the same time that it is providing a law-on-behalf of one of the venturers against another venturer.

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Similarly, use of mass advertising to promote the service must be carried out in compliance with the provisions of Rule 2-101. See generally L.A. County Bar Opinion No. 404. In addition to prohibiting false or misleading advertis-

ing, Rule 2-101 prohibits personal solicitation and solicitation by any means specifically directed to a particular potential client's particular legal problem, unless that communication is protected from abridgement by the state or federal constitutions. *Id.* Rule 2-101 thus presents several practical difficulties in light of the arrangement proposed by the inquiry. First, if a client came to ABC Realty Co. seeking brokerage services only, the partners at ABC could not solicit the client in any manner regarding legal services in connection with the real estate transaction unless that solicitation is constitutionally protected. L.A. County Bar Opinion No. 404. The lawyer should therefore insure that the client originally sought his services as an attorney in the first instance and not merely as a broker. L.A. County Bar Opinion No. 384. Second, the lawyer should insure that legal services are not provided to clients personally solicited by the broker-employees. *Id.* In light of the elusive distinction between legal and brokerage services in the real estate context, it would be advisable for ABC Realty not to provide any services, brokerage or legal, whatsoever for clients solicited by the broker employees.

The above authorities indicate in general that it is not unethical for a lawyer to practice two professions from a single office and to advertise his availability for employment in both professions. The question remains, however, whether the particular structure proposed in the inquiry comports with the requirements of the Rules of Professional Conduct. The inquiry has suggested two alternate proposals: in the first proposal, ABC Realty would refer legal services either to (a) an independent law firm or (b) a law firm whose partners are all partners in ABC Realty Co. In the second proposal, ABC Realty would itself perform the legal services. The Committee views the referral of legal business to a law firm whose partners are also partners of ABC Realty as the equivalent of ABC Realty performing the legal services itself; those proposals will be discussed together, *infra*.

The arrangement in which ABC Realty Co. refers work to an independent law firm raises the question of whether ABC Realty Co. is receiving compensation for recommending the employment of the independent law firm in violation of Rule 2-108. That Rule provides that a member of the State Bar shall not compensate, give or promise anything of value to any person licensed to practice law for the purpose of recommending employment of the member or as a reward for having made a recommendation resulting in employment of the member. The situation contemplated and prohibited by Rule 2-108 is that in which the lawyer to whom the client has been referred compensates the lawyer who referred the client. In the proposed arrangement, the law firm to which the referral is made does not compensate ABC Realty for the referral. Thus the proposed arrangement does not appear to fall within the literal structure of 2-108.

If ABC were to refer all legal work to a law firm whose members are all partners in ABC Realty, or, if ABC were to perform the legal services directly for the client, the lawyers would in effect be engaging in dual professions. As discussed above, such dual practice is not prohibited per se by the Rules of Professional Conduct. However, when a lawyer serves as both broker and attorney in a single transaction, he must follow the Rules of Professional Conduct both when he acts as attorney and as broker. L.A. Opinion No. 384, State Bar Opinion No. 1982-69. This requirement

highlights many of the potential areas of ethical impropriety raised by instant inquiry.

Rule 3-101 prohibits a member of the State Bar from aiding the unauthorized practice of law. The inquiry indicates that the attorney will employ brokers who will presumably have direct contact with clients. Although the broker-employee will be prohibited by contract from rendering legal advice and the customers will be so informed, the substantial overlap between the legal profession and the real estate brokerage business suggests that further measures may be necessary to insure that the broker-employees do not provide legal advice to the clients. It may be difficult for the client to appreciate the subtle distinctions between the non-legal brokerage services of the broker and the legal services of the attorney. The line between these functions may become even more indistinguishable in the eyes of the client if the lawyer himself is performing both legal and brokerage activities. There is a danger that by virtue of the broker-employee's association with the lawyer, the advice of broker employee will be afforded added legitimacy by the client, who is likely to assume that any advice provided by the broker-employee has the imprimatur of the attorney – whether such advice is legal or non-legal. The lawyer must therefore closely supervise the day-to-day activities of the broker-employees to insure that the prohibitions of Rule 3-103 are observed. This obligation imposes a substantially heavier supervisory burden than is normally required of a non-lawyer "supervising broker" responsible for several brokers.

In addition, there appears to be significant risk that the dual service will create problems of adverse interests. Although the inquiry states that legal services shall be provided to only one party to the transaction, that limitation may not avoid the potential for violation of Rule 5-102. Since a lawyer who acts in dual capacities in a single transaction is bound by the Rules of Professional Conduct in both capacities, the lawyer who performs brokerage services for both parties but legal services for only one party must still disclose to both parties his relation to the adverse party and his interest in the subject matter of the employment. Rules 4-101 and 5-102(A). Given the natural adversity of interests of buyer and seller, a lawyer would almost always be required to obtain the written consent of the buyer and seller before he could perform brokerage services for one party and legal services for the other. See Rule 5-102(B). The safer practice from an ethical standpoint is to simply limit representation in any capacity to one party in the transaction. See State Bar Opinion No. 1982-69.

An additional area of conflict may arise if the lawyer's compensation agreements with his broker-employees require the lawyer to pay the broker-employee upon location of a seller willing to sell at a price acceptable to the client. It is not inconceivable that the lawyer may have to counsel against the completion of the transaction for legal reasons not related to the economic advisability of purchasing the property. In such an instance, the lawyer himself would have an interest adverse to that of client because of his need to close the transaction to compensate his broker-employees. The State Bar Committee on Professional Responsibility and Conduct has taken the position that a fee arrangement which provides the attorney with significantly greater compensation if the transac-

tion is consummated may in itself create an adverse interest between the lawyer and the client. "Not only must this conflict be disclosed in writing to the client, the attorney must act scrupulously to insure that all actions taken are in fact in the best interest of the client. The attorney should also recognize that if matters awry, this very conflict may be offered as evidentiary support for a charge of malpractice." State Bar Opinion No. 1982-69. In light of the inquirer's proposed compensation arrangement, the consent of the client must be obtained in writing in each case after full disclosure to the client of the potential adverse interest. Rule 5-102. The client must also be given the opportunity to consult independent counsel and the transaction must be fair and reasonable. *Id.*

Representation of both parties to the transaction, even if one party uses only the brokerage services of the lawyer, may also create problems of confidentiality. The lawyer and his employees may, in their capacities as brokers, learn information which they are obliged to disclose in their capacities as brokers. That duty of disclosure might be inconsistent with the lawyer's obligation under Business & Professions Code Section 6068(e) to preserve the confidences of the client. A mere provision in the contract between the lawyer and his broker-employees does not address the problem of the fiduciary obligation of the broker to the client. Even if the lawyer represents only one party to the transaction, there still exists some danger that the lawyer will be required to disclose information in his capacity as broker that would be inconsistent with his duty of confidentiality as a lawyer. *See* State Bar Opinion 1982-69. The problem of confidentiality is complicated by the fact that it may not be clear in what capacity a lawyer/broker learns confidential information. The lawyer may thus subject his clients confidences to disclosure upon a claim that the information was provided to the lawyer in his capacity as broker. *See, e.g., Watt Industries v. Superior Court*, 115 Cal.App.3d 802 (1981).

The most serious areas of potential impropriety relate to the nature of the relationship between the lawyer and his broker-employees, particularly with respect to compensation. Rule 3-103 provides that a member of the State Bar shall not form a partnership with a person not licensed to practice law if any of the activities of the partnership consist of the practice of law, and Rule 3-102 provides that a member of the State Bar shall not directly or indirectly share legal fees except with a person licensed to practice law. While lawyers routinely employ non-lawyers to assist them, the compensation agreement and the nature of the dual practice described in the inquiry suggest that the broker-employees are more than traditional law office employees who are compensated with a fixed salary.

First, unlike most employees who are compensated at a predetermined hourly or monthly rate without regard to the success of the lawyer on a particular case, the broker-employees are paid only if the lawyer is paid by the client. Moreover, the compensation to the brokers is, with one qualification, a fixed percentage of the fee paid to the lawyer by the client. The inquiry states that the lump sum fee is segregated into brokerage and legal components according to a fixed formula. Such a fixed division of the profits without reference to the actual proportion of legal to brokerage services on a case by case basis appears to be more akin to sharing of profits in a partnership agreement than an employee-employer relationship. Although

the question of what constitutes a partnership is a legal question and therefore outside of the scope of this opinion, it can be observed that the more closely the lawyer-broker relationship resembles a partnership, the more likely that Rule 3-103 will be violated. Thus, it would be relevant whether losses are allocated and how expenses and overhead are paid and by whom.

In addition, the more mechanical the method for determining (or splitting) the legal and brokerage components of the lump sum fee paid by the client, the more likely it will be that the method of compensating the broker will constitute fee splitting with persons not licensed to practice law in violation of Rule 3-102. Rule 2-107 states that the reasonableness of a particular fee is determined by reference to a number of factors, including the difficulty and amount of work and the expertise required to perform the service. It is unlikely that the requirements of 2-107 will be satisfied to the extent that the compensation agreement ignores the factors listed in the Rule for determining the fee attributable to legal services. Although the attorney's hourly rate is used to determine his fees if the hourly fee exceeds the fee calculated according to the fixed percentage, the fixed formula is used in all other instances. Thus, if the attorney performed only 1/2 hour of legal services, he may still receive 25% of a \$10,000 commission; the lawyer is still splitting a lump sum fee for legal and non-legal services on an artificial basis without reference to the legal work actually performed. Because in many instances the fee paid to the lawyer will bear no proportion to the work actually performed in relation to the fee paid to the broker-employee, the mere fact that the lump sum fee is split into "legal" and "brokerage" components may not avoid the prohibition of 3-102.

In addition, the State Bar Committee on Professional Responsibility and Conduct has stated that all monies paid to a lawyer performing both brokerage and legal services in a single transaction should be regarded as a "legal fee." State Bar Opinion 1982-69. It would thus be improper for a lawyer-broker to split a commission with a broker representing the other party to the transaction; instead, the other broker should be compensated directly by his client. *Id.* Although the State Bar Opinion did not address the facts presented by the instant inquiry, the opinion suggests that any attempt to divide fee between a lawyer and a non-lawyer where the fee results from a transaction in which the lawyer has performed legal services may violate 3-102(A). Even if the literal strictures of Rule 3-102 are circumvented, the above analysis suggests that, in a given case, the prohibition of 3-102 may be violated by compensating an affiliated broker on a fixed percentage basis.

Although L.A. County Bar Informal Opinion No. 1979-4 states that it is not unethical for a lawyer to associate with a group of non-lawyer professionals under a trade name, the inquiry stated that (1) fees for services were billed by each professional directly to the client; (2) variable expenses (e.g. individual secretaries) were borne by each professional; and (3) common expenses (e.g. receptionist) were shared but in proportion to the individual professional's gross income. The structure of the business association thus circumvented the risk that a non-lawyer would receive part of a fee actually attributable to the services of a lawyer.

414

Opinion No. 414 (April 29, 1983)

CONFIDENTIAL COMMUNICATIONS. A lawyer has an ethical obligation not to reveal a client's confidential communications after the client's death. Unless an attorney is convinced beyond a reasonable doubt of a client's intent to commit a crime in the future, the attorney has an ethical obligation not to reveal the client's confidential communications.

AUTHORITIES CITED:

California Business and Professions Code §6068(e);
California Evidence Code §956;
People v. Canfield 12 Cal.3d 699 (1974);
Paley v. Superior Court, 137 Cal.App.2d;
People v. Singh, 123 Cal.App. 365 (1932);
State v. Doster, 284 S.E.2d 218 (S.C. App. 1981);
State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976);
Trupp v. Wolff, 24 Md.App. 588, 335 A.2d 171 (1975);
Los Angeles County Bar Association Formal Opinions
Nos. 353, 274, 264.

A member of the bar requests an opinion based on the following set of facts:

During his lifetime, Client, a national celebrity, consulted with Attorney. Client died and is survived by his wife and minor children. Several years after Client's death, Attorney revealed to a writer of a national magazine that Client had proposed several illegal tax schemes in which Attorney refused to participate.

The inquiring attorney asks:

Has Attorney breached his ethical duty not to reveal Client confidences by revealing the confidences after Client's death?

Has Attorney breached that same duty if the tax schemes were illegal?

For the purposes of this opinion, it is assumed Attorney and Client had a formal attorney-client relationship sufficient to impose a duty not to reveal Client's confidences in the normal course of events under California Business and Professions Code Section 6068(e). Furthermore, it should be noted, and this opinion assumes, the duty not to disclose Client confidences may arise even though the Attorney does not later represent the Client in the matters discussed. See People v. Canfield, 12 Cal.3d 699 (1974). Therefore, even though Attorney declined to participate in the matters discussed with Client, it is assumed, nonetheless, an attorney-client relationship existed.

It is well established that the attorney-client privilege is not destroyed by the death of the client. State v. Doster, 284, S.E.2d 218 (S.C. App. 1981); State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976); Trupp v. Wolff, 24 Md.App. 588, 335 A.2d 171 (1975). The only exception to that rule is in cases involving a testator's conversation with counsel concerning the drafting of a will in will contests, heirship proceedings and similar actions. See e.g. Paley v. Superior Court, 137 Cal.App.2d 450, 457 (1955). Therefore, the revelation of Client's illegal tax schemes to the writer is a violation of Business and Professions Code Section 6068(e) which provides: "It is the duty of an attorney:... (e) to maintain inviolate the confidence, and at every peril to himself preserve the secrets, of his client."

This committee has said in Formal Opinion 353:

"The confidentiality of the lawyer-client relationship is a very strong principle in California. Exceptions to it are strictly construed. The lawyer should, before failing to preserve the confidences and secrets of his client, be quite satisfied that he falls within an exception to the principle. He truly acts 'at every peril to himself' in failing to preserve these confidences and secrets."

A major exception to the rule that an Attorney should not reveal the confidences of her Client is when a Client communicates his intent to commit a crime or fraud. See California Evidence Code Section 956 which states, "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit a crime or fraud." In order to reveal such a confidence, the Attorney must first be satisfied beyond a reasonable doubt the intended acts are illegal and the Client's commission of the acts is imminent. See Formal Opinion Nos. 353, 274, and 264. Having satisfied these requirements, the Attorney must decide whether the disclosure of intent to commit future crimes might include disclosure of past crimes and wrong doings. If so, the Attorney is not permitted to make the disclosure. People v. Singh, 123 Cal.App. 365 (1932). Under the facts presented, Attorney's revelation of Client's proposed illegal tax schemes was not proper because there was no imminent possibility of a crime or fraud being perpetrated because Client was dead. Furthermore, the revelation might have shed light on past crimes or other misdeeds and is, in that case clearly improper. People v. Singh, supra.

Opinion No. 415 (July 20, 1983)

CONFLICTING INTERESTS—ARBITRATORS. An attorney acting as an arbitrator is held to the ethical standards of the Rules of Professional Conduct and the principles of the Code of Judicial Conduct. It is improper for him to permit an attorney appearing before him to represent him, and improper for that attorney to undertake the representation, without a knowing and written waiver of the conflict by the parties to the arbitration.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rules 4-101, 5-101 and 5-102;
Code of Judicial Conduct, Canons 1 and 2;
Code of Civil Procedure §170;
Opinion No. 302.

Our opinion has been requested with respect to the following facts: Law firm A represents the respondent in arbitration proceedings. The arbitrator is an attorney appointed by the American Arbitration Association. The arbitrator has been sued for alleged legal malpractice, and his malpractice carrier requested law firm A to represent the arbitrator in the malpractice action. At the time this request was made to law firm A, the arbitration proceedings had been going on for a period of months; the arbitration was complex and was not yet completed.

At that point—before any work was done by law firm A in defense of the malpractice claim—the firm realized what

#415

Opinion No. 414 (April 29, 1983)

CONFIDENTIAL COMMUNICATIONS. A lawyer has an ethical obligation not to reveal a client's confidential communications after the client's death.

Unless an attorney is convinced beyond a reasonable doubt of a client's intent to commit a crime in the future, the attorney has an ethical obligation not to reveal the client's confidential communications.

AUTHORITIES CITED:

California Business and Professions Code § 6068(e);
California Evidence Code § 956;
People v. Canfield 12 Cal.3d 699 (1974);
Paley v. Superior Court, 137 Cal.App.2d;
People v. Singh, 123 Cal.App. 365 (1932);
State v. Doster, 284 S.E.2d 218 (S.C. App. 1981);
State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976);
Trupp v. Wolff, 24 Md.App. 588, 335 A.2d 171 (1975);
Los Angeles County Bar Association Formal Opinions
Nos. 253, 274, 264.

A member of the bar requests an opinion based on the following set of facts:

During his lifetime, Client, a national celebrity, consulted with Attorney. Client died and is survived by his wife and minor children. Several years after Client's death, Attorney revealed to a writer of a national magazine that Client had proposed several illegal tax schemes in which Attorney refused to participate.

The inquiring attorney asks:

Has Attorney breached his ethical duty not to reveal Client confidences by revealing the confidences after Client's death?

Has Attorney breached that same duty if the tax schemes were illegal?

For the purposes of this opinion, it is assumed Attorney and Client had a formal attorney-client relationship sufficient to impose a duty not to reveal Client's confidences in the normal course of events under California Business and Professions Code Section 6068(e). Furthermore, it should be noted, and this opinion assumes, the duty not to disclose Client confidences may arise even though the Attorney does not later represent the Client in the matters discussed. See People v. Canfield, 12 Cal.3d 699 (1974). Therefore, even though Attorney declined to participate in the matters discussed with Client it is assumed, nonetheless, an attorney-client relationship existed.

It is well established that the attorney-client privilege is not destroyed by the death of the client. State v. Doster, 284, S.E.2d 218 (S.C. App. 1981); State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976); Trupp v. Wolff, 24 Md.App. 588, 335 A.2d 171 (1975). The only exception to that rule is in cases involving a testator's conversation with counsel concerning the drafting of a will in will contests, heirship proceedings and similar actions. See e.g., Paley v. Superior Court, 137 Cal.App.2d 450, 457 (1955). Therefore, the revelation of Client's illegal tax schemes to the writer is a violation of Business and Professions Code Section 6068(e) which provides: "It is the duty of an attorney:.... (e) to maintain inviolate the confidence, and at every peril to himself preserve the secrets, of his client."

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A major exception to the rule that an Attorney should not reveal the confidences of her Client is when a Client communicates his intent to commit a crime or fraud. See California Evidence Code Section 956 which states, "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit a crime or fraud." In order to reveal such a confidence, the Attorney must first be satisfied beyond a reasonable doubt the intended acts are illegal and the Client's commission of the acts is imminent. See Formal Opinion Nos. 353, 274, and 264. Having satisfied these requirements, the Attorney must decide whether the disclosure of intent to commit future crimes might include disclosure of past crimes and wrong doings. If so, the Attorney is not permitted to make the disclosure. People v. Singh, 123 Cal.App. 365 (1932). Under the facts presented, Attorney's revelation of Client's proposed illegal tax schemes was not proper because there was no imminent possibility of a crime or fraud being perpetrated because Client was dead. Furthermore, the revelation might have shed light on past crimes or other misdeeds and is, in that case clearly improper. People v. Singh, *supra*.

Opinion No. 415 (July 20, 1983)

CONFLICTING INTERESTS—ARBITRATORS. An attorney acting as an arbitrator is held to the ethical standards of the Rules of Professional Conduct and the principles of the Code of Judicial Conduct. It is improper for him to permit an attorney appearing before him to represent him, and improper for that attorney to undertake the representation, without a knowing and written waiver of the conflict by the parties to the arbitration.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rules 4-101, 5-101 and 5-102;
Code of Judicial Conduct, Canons 1 and 2;
Code of Civil Procedure §170;
Opinion No. 302.

Our opinion has been requested with respect to the following facts: Law firm A represents the respondent in arbitration proceedings. The arbitrator is an attorney appointed by the American Arbitration Association. The arbitrator has been sued for alleged legal malpractice, and his malpractice carrier requested law firm A to represent the arbitrator in the malpractice action. At the time this request was made to law firm A, the arbitration proceedings had been going on for a period of months; the arbitration was complex and was not yet completed.

At that point—before any work was done by law firm A in defense of the malpractice claim—the firm realized what

had occurred and sent a note to the opposing attorney in the arbitration. The note disclosed the fact that law firm A now represented the arbitrator in a case of alleged legal malpractice. About a week later, law firm A filed an answer on behalf of the arbitrator, becoming his attorney of record, and the firm has continued to represent the arbitrator in the malpractice case.

At the next scheduled arbitration hearing the arbitrator acknowledged that the petitioner now was faced with the prospect of trying his case before an arbitrator who was a client of the respondent's law firm; the arbitrator offered to withdraw and declare a mistrial. The arbitrator stated that he insisted on being represented by law firm A in the malpractice action. The petitioner requested the arbitrator to continue, particularly because of the substantial investment the petitioner already had made in the arbitration.

Nevertheless, on the next hearing date the respondent and law firm A stated that they were unwilling to continue with the arbitrator and asked that he disqualify himself. Over the petitioner's objections, the arbitrator disqualified himself and declared a mistrial.

The petitioner's attorneys have asked our opinion on three issues:

1. Was it proper for a law firm which was trying a case before an arbitrator (or a judge) to take on the representation of the arbitrator (or judge) in an unrelated matter?

2. Was it proper for an arbitrator (or a judge) to become a client of one of the law firms trying a matter before him?

3. Was it proper for the law firm, which knowingly created the conflict of interest by accepting representation of the arbitrator, to use that conflict to request the arbitrator to disqualify himself?

1. Because of the high duty of fidelity to the client's cause which is required of every attorney, no attorney may accept employment which is potentially adverse to the client without the informed and written consent of all parties concerned. California Rules of Professional Conduct, Rule 5-102(b). The fact that the respondent requested the arbitrator to disqualify himself on the basis of a conflict of interest strongly suggests that law firm A did not meet this obligation to its existing client, but a determination of this fact is beyond the scope of this *ex parte* opinion. The obligation of law firm A to its client is not affected by the fact that the conflict arose in an arbitration proceeding. See Opinion No. 302.

2. Although it is beyond our jurisdiction to comment on the ethical obligations of judges, an attorney in acting as an arbitrator is held to the ethical standards of the principles of the Code of Judicial Conduct and the related provisions of CCP §170, and to the Rules of Professional Conduct. The Code of Judicial Conduct does not appear to directly prohibit a judge from being represented by an attorney who is appearing before him in an unrelated matter, and CCP §170 requires the judge to disqualify himself only when his relationship to the attorney is within the third degree of consanguinity. Nevertheless, we conclude that a serious ethical question is raised when an attorney acting as an arbitrator accepts representation from a law firm that is appearing before him. See, for example, Canon 1 which requires maintenance and enforcement of "...high standards of conduct so that the integrity and independence of the judiciary may be preserved" and Canon 2 which requires that a judge "...should conduct himself at

all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The better practice is for the arbitrator either to decline the services of law firm A from the beginning, or else to seek a knowing and written waiver of the conflict as permitted by CCP §170(a)(3) and Rule 5-102 of the Rules of Professional Conduct. When the respondent refused to give that waiver, the arbitrator was obligated to choose between his duties as arbitrator and his personal interest. It is not in the interests of the judicial system nor in the highest traditions of the legal profession for the arbitrator to put his own interests before the duty he has undertaken if a party wishes to proceed for any reason, but we believe that extreme circumstances may exist that make it proper for the arbitrator to put his personal wishes first. Whether those circumstances here existed is beyond the scope of this *ex parte* opinion.

3. Our conclusion that law firm A acted improperly in accepting representation of the arbitrator makes it unnecessary for us to reach this issue.

Opinion No. 416 (October 25, 1983)

RIGHT TO COUNSEL; COMMUNICATING WITH AN ADVERSE PARTY REPRESENTED BY COUNSEL; AVOIDING ADVERSE INTEREST. A party to an action may employ a second attorney to represent him on a motion by his first attorney to be relieved as counsel of record. The second attorney is not required by Rule 7-103 to obtain the consent of the first attorney. A fee payable entirely out of the proceeds to be realized from a judgement already obtained in the action would be permissible provided there is compliance with Rules 2-107(a) and 5-101.

AUTHORITIES CITED:

Code of Civil Procedure, Section 284, 285.
California Rules of Professional Conduct,
Rules 2-107, 5-101, and 7-103.
Ames vs. State Bar (1973) 8 Cal.3d 910.
Cetenko vs. United California Bank (1982)
30 Cal.3d 528.

The Committee's opinion has been requested with respect to the following questions:

1. May a party have independent counsel to represent him at the hearing on the Motion to be Relieved as Counsel brought by the party's counsel of record?

2. Will there be any violation of rules concerning the contact by a member of the Bar with parties having counsel?

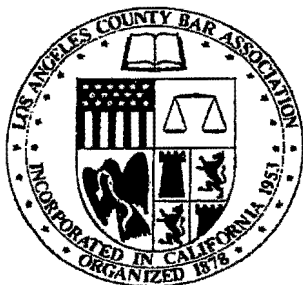
3. What are permissible fee arrangements if the party's only way of paying legal fees to new counsel is to obtain a satisfaction of judgment previously entered in the subject lawsuit. The judgment provides for the party's receipt of \$8,000.00 plus reconveyance of certain real property.

DISCUSSION

A. The problem presented by the first question is that the party's counsel of record is now adverse and the party wants independent counsel to represent him against counsel of record.

The Motion to be Relieved must be viewed as an adversary hearing between a party, on the one hand, and his attorney of record, on the other.

#416



LOS ANGELES COUNTY BAR ASSOCIATION

261 South Figueroa Street
Los Angeles, CA 90012
Tel (213) 896-6560 Fax (213) 896-6586
MSD@lacba.org

From the Desk of:

- () Kathy Adams
- () Desire Clare
- (x) Shirleen Yorke
- () Kyan Coward

Fax

To: Robert Han Pages 5 (including Cover Page)
Fax: 310-315-8210 Date 10/3
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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 416

October 25, 1983

RIGHT TO COUNSEL; COMMUNICATING WITH AN ADVERSE PARTY REPRESENTED BY COUNSEL; AVOIDING ADVERSE INTEREST. A party to an action may employ a second attorney to represent him on a motion by his first attorney to be relieved as counsel of record. The second attorney is not required by Rule 7-103 to obtain the consent of the first attorney. A fee payable entirely out of the proceeds to be realized from a judgement already obtained in the action would be permissible provided there is compliance with Rules 2-107(a) and 5-101.

AUTHORITIES CITED: Code of Civil Procedure, Section 284, 285.
California Rules of Professional Conduct, Rules 2-107, 5-101, and 7-103.
Ames vs. State Bar (1973) 8 Cal. 3d 910.
Cetenko vs. United California Bank (1982) 30 Cal. 3d 528.

The Committee's opinion has been requested with respect to the following questions:

1. May a party have independent counsel to represent him at the hearing on the Motion to be Relieved as Counsel brought by the party's counsel of record?
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3. What are permissible fee arrangements if the party's only way of paying legal fees to new counsel is to obtain a satisfaction of judgment previously entered in the subject lawsuit? The judgment provides for the party's receipt of \$8,000.00 plus reconveyance of certain real property.

DISCUSSION

A. The problem presented by the first question is that the party's counsel of record is now adverse and the party wants independent counsel to represent him against counsel of record.

The Motion to be Relieved must be viewed as an adversary hearing between a party, on the one hand, and his attorney of record, on the other.

There is no doubt as to the right of a party to change his attorney at any time (C.C.P. Sec. 284). However, the first issue implies that the party has refused to execute a Substitution of Attorney, thereby requiring counsel of record to file a Motion to be Relieved as Counsel of Record. Assuming these facts to be so, it would preclude application of the rule that a new lawyer may not undertake a matter wherein the client is still represented by counsel of record until counsel of record is notified of the termination of his employment. (See Opinion No. 154.) Although independent counsel should give notice of his intended appearance to counsel of record, the question of what notice independent counsel must give is not within the scope of

this opinion.

B. The prohibition of Rule 7-103 is applicable to communications with an adverse party. This rule was based on former Rule 12 and ABA Code, DR7-104A(1) which was so limited. (See Witkin, California Procedure, 2d Edition, Attorneys, Sec. 237, Volume 1, p. 248.) In this case, there is no adverse party and Rule 7-103 is therefore inapplicable.

C. Under Rule 2-107A, the fee arrangement between a member of the State Bar and a client shall not be illegal or unconscionable. Whenever an attorney engages in a fee arrangement which involves the use of subject matter as a source of payment, the attorney must be extremely careful to protect his client's rights and avoid adverse interest. At a minimum, the fee arrangement must be governed by the standards set forth in Rule 5-101.

Earlier cases defined an attorney's acquisition of an interest adverse to their client as an attorney's obtaining an interest in the subject matter of the litigation for which they had been retained. Ames vs. State Bar (1973) 8 Cal. 3d 910, 917-919. However, in Cetenko vs. United California Bank (1982) 30 Cal. 3d 528, the attorney and client entered into a written fee arrangement whereby the attorney was to be paid on an hourly basis to represent the client in an action to establish ownership of a

parcel of real property. Most of the fee would be deferred and fees owed would become a lien upon the amount recovered in the action. The client argued that a contract for an hourly fee which is to constitute a lien on the judgment is unconscionable as a matter of law because the fee and the costs may consume the entire amount of the judgment recovered. The Court held, however, that the fee arrangement was not invalid as unconscionable and could be enforced. Cetenko, supra, at 532.

Therefore, if the strictures of Rules 2-107 and 5-101 are followed, the attorney is not precluded from using the judgment proceeds as a source of payment on his fees.

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and its opinions are based on such facts only as are set forth in the questions presented.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 417

(June 15, 1983)

CONFIDENTIAL COMMUNICATION - An attorney may not disclose confidential information, learned through the attorney-client relationship, absent client consent, even where the client has determined to follow a future cause of conduct which will result in receiving monies to which it would appear the client is not entitled.

AUTHORITIES CITED:

California Business and Professions Code Section 6068(d) and (e); California Rules of Professional Conduct, Rule 2-111(C)(1)(b), (c), and (d); LACBA Formal Opinions 264, 267, 353, 386; San Francisco Formal Opinion 1977-2.

Attorney represents Wife in a marital dissolution proceeding. One presumed asset of the community is an oil lease which Husband and Wife executed with Oil Company at a time when they together owned the real property incident to the lease. The marital settlement agreement, which is incorporated in the dissolution order of the court, provides in part that title in the oil lease is to be changed from joint tenancy to tenancy-in-common and that oil royalties are to be divided equally between Husband and Wife.

Attorney contacts Oil Company which requires, to make the title change, either a grant deed or certified copy of the dissolution order. Attorney therefore orders from Title Company copies of a 1970 grant deed and the oil lease. In reviewing the grant deed received from Title Company whereby Husband and Wife sold the real property to Buyers, Attorney realizes, for the first time, that there is no reservation of mineral rights in the property by sellers. When attorney confronts Wife with this information, Wife relates that since at the time of sale Buyers did not specifically request conveyance of oil rights, she and Husband assumed they retained title to the oil lease. Wife tells Attorney that for several years after the sale of the property she and Husband received no oil royalties but during the last few years they have been receiving monthly royalty payments which now aggregate approximately \$5,000.

Attorney again contacts Title Company and determines that the 1970 title report stated that the oil lease was unrecorded. However, a further check now reveals that the oil lease with Husband and Wife had been recorded by Oil Company in 1962. Title Company advises that a new title search and report establishing present ownership of the oil lease will cost about \$400.

Attorney reports to Wife that she and Husband may not be the actual owners of the oil lease. Attorney also

advises Wife of possible civil and criminal liability resulting from acceptance of oil royalty payments. Wife is informed of the cost of a new title report to establish present ownership of the oil lease. Wife refuses to pay for the title report, instructs Attorney not to pursue the matter further, but Wife still wants title in the oil lease changed to tenancy-in-common so she will be assured of receiving half the royalties.

Attorney inquires:

(1) Should Attorney send to Oil Company a copy of the dissolution order necessary to change title in the oil lease, or should Attorney leave the dissolution incomplete in respect thereto and send Wife a letter which absolves Attorney of liability for failure to complete the change of title?

(2) Does attorney have a duty to notify Buyers of the newly-discovered information respecting the title of the oil lease?

(3) Does Attorney have a duty to notify Oil Company of the newly-discovered information respecting the title of the oil lease?

Addressing first inquiry (1), California Business and Professions Code section 6068 subdivision (d) provides in pertinent part that an attorney is under a duty "[t]o

employ, for purposes of maintaining the causes confided to him such means only as are consistent with truth...." Since Attorney and Wife have been placed on notice that Husband and Wife may not be the actual owners of the oil lease, and Wife has instructed Attorney not to ascertain the true owner, Attorney cannot send to Oil Company a copy of the dissolution order which Attorney knows may not be truthful. (Id. See also Opinion 267.) It might be advisable for Attorney to again impress upon Wife that her continued acceptance of oil royalty payments, without verifying true ownership, may subject Wife to continuing civil liability as well as criminal liability now that Wife is aware that she may not be the owner of the oil lease. (Cf. Opinion 267.) If Wife refuses to accept Attorney's advise to determine present ownership of the oil lease, then Attorney may withdraw from further representation of Wife. (See Rule 2-111(c)(1)(b), (c) and (d); Opinions 305, 353, San Francisco Ethics Opinion 1977-2.)

Attorney's inquiry respecting absolution of legal liability addresses a question of law upon which this Committee does not comment.

Attorney's inquiries (2) and (3) raise analogous ethical concerns which are treated herein together. California Business and Professions Code section 6068 subdivision (e) provides that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril

to himself to preserve the secrets, of his client." Wife has refused to allow Attorney to disclose information obtained during, or as the result of, the confidential relationship between herself and Attorney. The prohibition against violation of this confidence extends to instances of civil fraud perpetrated by the client (Opinions 264, 274, 386). Attorney-client confidences may not be disclosed where future crime is contemplated by the client and the Attorney has received the information in confidence and in connection with confession of past crime. (Opinions 267, 386, see also Opinion 353). Additionally, no disclosure is permitted in respect to future crime where the client's intended acts are not of a nature so serious that the benefits flowing from their prevention do not outweigh the important policy requiring protection and preservation of client confidentiality. (Opinions 264, 353.) Here Wife's contemplated acceptance of future royalty payments has been revealed to Attorney through Wife's admission of acceptance of past payments. Moreover, although Wife's contemplated acceptance of future royalty payments might be theft, there may still exist some question as to who presently owns the oil lease. This Committee has held that client confidence is protected where the client receives monthly payments under circumstances of possible theft by false pretense. (Opinion 264.) A similar situation exists in the inquiry sub judice. The Committee is of the opinion that disclosure to anyone of the new information learned regarding the status of the title of the oil

lease, absent express client approval, is ethically prescribed. (California Business and Professions Code section 6068 subdivision (e), Opinions 264, 267, 353.)

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the questions submitted.

418

torney and Wife have been placed on notice that Husband and Wife may not be the actual owners of the oil lease, and Wife has instructed Attorney not to ascertain the true owner, Attorney cannot send to Oil Company a copy of the dissolution order which Attorney knows may not be truthful. (Id. See also Opinion 267.) It might be advisable for Attorney to again impress upon Wife that her continued acceptance of oil royalty payments, without verifying true ownership, may subject Wife to continuing civil liability as well as criminal liability now that Wife is aware that she may not be the owner of the oil lease. (Cf. Opinion 267.) If Wife refuses to accept Attorney's advice to determine present ownership of the oil lease, then Attorney may withdraw from further representation of Wife. (See Rule 2-111(C)(1)(b), (c) and (d); Opinions 305, 353, San Francisco Ethics Opinion 1977-2.)

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Opinion No. 418 (August 17, 1983)

ADVERSE INTERESTS . A law firm may represent a client no longer represented by that law firm where the law firm has obtained no confidential information during the course of the former representation that could be utilized in the new representation.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rules 4-101, 5-102(A);
ABA Code of Professional Responsibility DR 5-105(D);
LACBA Formal Opinions 27, 192, 392, 406;
Standing Committee on Professional Responsibility and Conduct of the State Bar of California [State Bar] Opinion 1981-57.

The Committee's opinion has been requested concerning the ethical propriety of a law firm (Law Firm) representing an attorney-client (Attorney 1) in a legal malpractice action where the Law Firm seeks to file a cross-complaint against Attorney 2 who was previously represented by the Law Firm in a completed and unrelated legal malpractice matter. The Committee is informed that no confidential information was obtained during Law Firm's representation of Attorney 2 which could be utilized in the representation of Attorney 1. Law Firm no longer represents Attorney 2 in any matter. Law Firm initially obtained Attorney 2's oral consent to represent Attorney 1. However, Attorney 2 informed Law Firm, in writing, four days later, that he "did not wish to waive the conflict of interest." Law Firm requests an opinion as to whether it is ethically proper to continue its representation of Attorney 1.

California Rules of Professional Conduct, Rule 4-101 provides in pertinent part that an attorney shall not accept employment adverse to a former client without the informed and written consent of the former client "relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such ... former client." Rule 4-101 does not forbid a lawyer's accepting employment adverse to a former client in every instance; the emphasis is placed upon use of or disclosure of confidential information (Formal Opinions 27, 192, 406). Rule 4-101 is violated only if an attorney obtained confidential information about the former client which concerns, directly or indirectly, the matter against that former client (State Bar Opinion 1981-57). This situation does not exist under the stated facts of the inquiry submitted to the Committee. Therefore, Law Firm may properly represent Attorney 1 against Attorney 2 irrespective of Attorney 2's refusal to consent to such representation.*

Because Law Firm previously represented Attorney 2, it is incumbent upon Law Firm to disclose to Attorney 1 the prior representation of Attorney 2 and to obtain from Attorney 1 written consent to continue employment (California Rules of Professional Conduct, Rule 5-102(A); Formal Opinion 406).

* Since the Committee finds there is no ethical impropriety under the facts of the posed inquiry, it does not matter whether the representation of Attorneys 1 and 2 is and was by a specific attorney or by Law Firm generally (see ABA Code of Professional Responsibility DR 5-105(D), adopted in California in Chambers v. Superior Court, 121 Cal.App.3d 893, 898 (3d Dist. 1981) which provides that if a lawyer is required to decline employment under an ABA Disciplinary Rule no lawyer affiliated with him/her nor his/her law firm may accept or continue such employment.)

Formal Ethics Opinion
419 8-17-83

Opinion No. 419 (August 17, 1983)

SOLICITATION AND ADVERTISING. Advertising and solicitation by random public distribution of brochures and business cards is authorized by the Rules of Professional Conduct so long as the advertising is not false or misleading.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rule 2-101;
Los Angeles County Ethics Opinion No. 404;
In Re R.M.J., U.S. ___, 102 Sup. Ct. 929 (1982);
Bigelow v. Virginia, 421 U.S. 809 (1975)

The Committee's opinion has been requested concerning the ethical propriety of randomly distributing to the general public copies of the California State Bar pamphlet "What Should I Do If I Have An Automobile Accident?" to which an attorney's business card is attached. The distribution would be random, leaving them at a door step or placing them under the windshield wiper of a publicly parked vehicle.

The recognition of Constitutional protection for commercial speech and press, which began with Bigelow v. Virginia, 421 U.S. 809 (1975), has resulted in the federalization and constitutionalization of the regulation of lawyer solicitation and advertising. The resulting federal law and California Rules of Professional Conduct are generally described in Los Angeles County Bar Ethics Opinion No. 404.

As to announcements and handbills, the United States Supreme Court invalidated prohibitions on announcement cards mailed to the general public, leaving the states with authority to require the filing of announcements, mailings, and handbills with state authorities. In Re R.M.J., U.S. ___, 102 Sup. Ct. 929 (1982).

The related California Rules of Professional Conduct are Rule 2-101(E) and Rule 2-10(A). The former requires the retention of such materials for one year, making them available to the State Bar upon request, and providing supporting information upon request for any factual or objective claims.

Rule 2-101(A) contains restrictions on false or misleading communications (a "communication" is defined as a message concerning the availability for professional employment of a member or a member's firms). Pursuant to Rule 2-101(D), the Board of Governors adopted the following standards which are applicable to randomly distributed advertising and which supplement the restrictions in Rule 2-101(A):

1. A "communication" which contains guarantees, warranties, or predictions regarding the result of legal action is presumed to violate Rule 2-101, Rules of Professional Conduct.

2. A "communication" which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct.

Thus, the random distribution of handbills is ethically proper so long as Rules 2-101(A) and (E) are satisfied.

Opinion No. 420 (October 25, 1983)

ATTORNEY AND CLIENT: CRIMINAL FILES-DUTY TO RETAIN. In the absence of written instruction by the client, the client's file relating to a criminal matter in the possession of an attorney should be retained by the attorney and not destroyed.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rule 8-101.
L.A. Opinions 330, 362, 405.
California Government Code section 26205.

A public law office has asked the opinion of this Committee concerning its obligation to retain client files after a case is concluded. The office typically represents clients in felony, misdemeanor, juvenile, civil contempt, and mental health proceedings. The office faces significant problems of storage and retrieval for hundreds of thousands of files; the likelihood of retrieval varies with the different types of case.

To some extent, statutes provide procedures for the destruction of public records. (See, for example, Govt. Code §26205.) The Committee does not offer any interpretation of governing statutes. As an ethical matter, however, it appears clear that the file belongs to the client. California Rule 8-101 directs an attorney to preserve client properties. In Opinions 330, 362, and 405, this Committee has consistently taken the position that the file, including "work product," is the property of the client. Nothing other than the client's permission appears to limit the duty to preserve this property.*

Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. The Committee concludes, therefore, that it is incumbent upon the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative.

* This opinion does not address civil matters or the manner of obtaining a client's permission for the destruction of civil files.

Opinion No. 421 (October 25, 1983)

LETTERHEADS OF COUNSEL. The name of a firm appearing on its letterhead should not include the name of an attorney who has never been a partner and is merely "of counsel" to the firm.

AUTHORITIES CITED:

Rule 2-101, Opinion Nos. 290, 306;
Informal Opinion Nos. 1959-3, 1973-4;
ABA Opinion 106, 126, 271, 330.

The opinion of the Committee has been solicited with respect to the ethical propriety of a law firm including in the firm name the name of an attorney who is not and has never been a partner but serves, substantially full-time, in an "of counsel" relationship, and is listed on the letterhead in an "of counsel" capacity.

The use of the term "of counsel" in designating a professional relationship between an individual attorney and a

420

Opinion No. 419 (August 17, 1983)

SOLICITATION AND ADVERTISING. Advertising and solicitation by random public distribution of brochures and business cards is authorized by the Rules of Professional Conduct so long as the advertising is not false or misleading.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rule 2-101;
Los Angeles County Ethics Opinion No. 404;
In Re R.M.J., U.S., 102 Sup. Ct. 929 (1982);
Bigelow v. Virginia, 421 U.S. 809 (1975)

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421

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The use of the term "of counsel" in designating a professional relationship between an individual attorney and a

law firm or attorney has long been considered ethically proper to designate a continuing relationship between an individual lawyer and a law firm or another lawyer, which relationship is not that of a partner or associate. See Opinion No. 306, ABA Opinion No. 330, Informal Opinion No. 1973-4. However, including the name of an attorney who is only "of counsel" to the firm, and has never been a partner, in the name of a firm is ethically improper. Rule 2-101(A)(2) requires that any communication made by an attorney shall not:

"[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public"

The use of the name of an attorney who is "of counsel" to the firm in the name of the firm suggests that the relationship between the attorney and the firm is that of a partnership and more than simply an "of counsel" relationship and is, therefore, confusing and misleading. The relative prominence on the letterhead of the firm's name compared to the identification of the particular attorney elsewhere on the letterhead as "of counsel" does not sufficiently eliminate the improper confusion.

In Opinion No. 290 this Committee expressed the opinion that inclusion in a law firm name of an individual who was not a partner of the other persons whose names were included in the firm name was professionally improper in that it misled that public into believing that all of the attorneys were partners when, in fact, at least their intention was otherwise. See also, ABA Opinions 106, 126 and 277 which reach the same conclusion based upon language in former Canon 33 which, in language similar to Rule 2-101, prescribed that "in the selection and use of a firm name, no false, misleading, assumed or trade name should be used."

Whether a court would find that a partnership actually exists among the persons whose names are included in the firm name, notwithstanding that one of them purports to practice only in an "of counsel" capacity with the firm, is a question of law on which this Committee expresses no opinion. However, the Committee is of the opinion that absent an agreement in the nature of a partnership to be jointly and severally responsible for each other's acts in connection with their law practice, then the use of a firm name including the name of an individual attorney who is only "of counsel" to the firm is improper.

Opinion No. 422 (October 25, 1983)

CONFIDENTIAL COMMUNICATIONS. An attorney may not disclose, over the client's objection, confidential information received from the client which concerns the false filing of Client's bankruptcy petition by a third person.

AUTHORITIES CITED:

California Rules of Professional Conduct 7-104;
California Business and Professions Code
Section 6068(d) and (e);
LACBA Formal Opinions 267, 305, 417;
San Francisco Bar Association Opinion 1977-1;
People v. Singh (1932) 123 Cal.App. 365.

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People v. Singh (1932) 123 Cal.App. 365.

Attorney A represents Client who, until recently, has had a long-standing personal relationship with Attorney B. Client has learned that B filed and forged Client's name to a Chapter 13 voluntary bankruptcy petition. B's action was taken without Client's knowledge or permission. Client is concerned that her credit rating has been, and will continue to be, affected by the filing of the bankruptcy petition. However, Client does not wish to ruin B by causing him to be prosecuted criminally. Instead, she would prefer to obtain only a civil settlement from B. Client refuses to allow Attorney A to disclose to anyone the above information related in confidence to Attorney A.

Attorney A inquires of this Committee:

(1) Whether A has an affirmative duty to disclose B's conduct to the bankruptcy court in the event that A confirms that the false bankruptcy petition has been filed?

(2) If no affirmative duty to disclose the information exists does A violate Client's confidence by making a disclosure?

(3) Assuming A is forbidden to disclose Client's confidence, and Client does not desire to disclose the information, is it ethically improper for A to enter into civil settlement with B?

(4) Assuming A is forbidden to disclose Client's confidence, is it ethically improper to file and pursue a legal action against B?

Inquiries (1) and (2) are discussed together. California Business and Professions Code Section 6068(e) provides in pertinent part that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client." People v. Singh (1932) 123 Cal.App. 365, 369-370 stresses the importance of maintaining inviolate client confidences. Opinions of this Committee have held that an attorney cannot ethically disclose client confidences even where it is the client who is engaged in unlawful activity (Opinion 305 [client commits perjury in testimony before a court], Opinion 267 [client, who is guardian, misappropriates funds from her child's guardianship account]). The inquiries in the matter sub judice concern alleged unlawful conduct perpetrated not by Client but by a third person. Thus, Attorney A cannot ethically, without Client's consent, disclose any information about the bankruptcy proceeding learned incident to or as a result of the confidential attorney-client relationship.*

Inquiries (3) and (4) are treated simultaneously. It is the opinion of this Committee that A may ethically enter into a settlement with B and/or may file and pursue a legal cause of action against B. However, A is cautioned in both respects that he must "employ, for purposes of maintaining the causes confided to him such means as are consistent with truth" (Business and Professions Code Section 6068(d).) (See also Opinions 267 and 417, California Rule of Professional Conduct 7-104.)

* There is no duty upon an attorney to report a known impropriety of another attorney to the appropriate agencies (San Francisco Bar Association Ethics Opinion 1977-1). While a moral obligation may exist, it cannot outweigh the attorney's ethical duty to maintain inviolate client confidences (Business and Professions Code Section 6068(e)).

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 423

(DECEMBER 19, 1983)

LOYOLA LAW SCHOOL

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LAW LIBRARY

FEE SPLITTING; CONFLICT OF INTEREST: USE OF FRANCHISE NETWORK;
CONFIDENTIAL INFORMATION: USE OF COMPUTERIZED BILLING SERVICE.
It is improper for a franchisee to pay franchise fees to the franchisor if the fees are based on a percentage of the fees received by the franchisee in handling a particular matter; it is a conflict of interest for a franchisee to represent a party in a lawsuit against another party represented by a different franchisee where both franchisees are being advised on the matter by the franchisor; it is ethically proper for an attorney to use an outside computerized billing service in billing clients so long as care is taken in selection of the services and to avoid the disclosure of confidential information.

AUTHORITIES CITED:

Rules 2-101(A)(2), 2-108(A), 3-102(A),
4-101, 5-102(B) and 6-101 L.A.C.B.A.
Formal Nos. 290, 374, 385, and 421
ABA Opinion Nos. 106, 126, 277, ABA
Informal Opinion No. 1127, ABA Code
of Professional Responsibility EC 4-3
Cal. Bus. & Prof. Code §6068(e)

The Committee's opinion has been requested on the ethical propriety of a franchised legal network to be known as "X & Associates" (the franchisor). The franchisor will establish a network of offices each owned by a young and qualified lawyer (the franchisee). Each office will carry the franchisor and franchisee's names, e.g., "X & Jones," "X & Smith," etc.

In return for fees paid by the franchisee, the franchisor will provide the following services:

(1) assistance in locating an office site and in lease negotiations;

(2) central computer billing;

(3) centralized legal library;

(4) standardized forms, signs, stationery, etc.;

(5) advertising and local marketing support programs;

(6) seminars on a regular basis; and

(7) a Board of Directors Support Team. This group will consist of distinguished lawyers and legal educators with in-depth knowledge of a wide variety of legal areas. Members of the group (or their associates) will be available to provide assistance to the franchisees. This will enable the franchisee to provide a broad range of services to their clients, even in matters beyond the franchisees' expertise.

The inquirer has not posited a specific problem but rather asks the Committee's opinion as to possible ethical violations.

Since the offices will carry the names "X & Jones," "X & Smith," etc., the problem of false and misleading advertising comes into play. Rule 2-101(A)(2) of the Rules of Professional Conduct of the State Bar requires that any communication made by an attorney shall not:

(c) contain any matter or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public...

In Opinion No. 290 this Committee expressed the opinion that the inclusion in a law firm name the name of an individual who was not a partner of those persons included in the firm name was professionally improper in that it mislead the public into believing that all of the attorneys were partners when, in fact, their intention was otherwise.

See also L.A.C.B.A. Formal Opinion No. 421 (ethically improper to include in the firm name the name of an attorney who is only "of counsel" to the firm and has never been a partner): ABA Opinion Nos. 106, 126, and 277 (same conclusion based upon language in former Canon 33 similar to Rule 2-101). The Committee therefore believes that the names "X & Smith," "X & Jones," etc. would be ethically improper where, as here, X is not and has never been a partner in the firm, nor is X providing any service; therefore, the use of his name is false and misleading. Partner is taken to mean one with a bona fide share in the profits, liabilities and professional responsibilities of the firm. L.A.C.B.A. Formal Opinion No. 385. There is no indication that such a relationship is intended by the proposed franchise network.

Rule 2-108(A) prohibits the division of legal fees by a lawyer with another lawyer who is not his partner or associate unless the client consents in writing to the division of fees and the total fee is not increased solely by reason of the division of fees between the lawyers. The inquirer states that the franchisee is to pay fees but does not elaborate as to how the fees are calculated. Assuming the fees are based on a percentage of each case the franchisee handles, and therefore paid out of fees received by the franchisee for legal services performed, the franchisee might be in violation of Rule 2-108(A) since he would be dividing legal fees with a non-partner or associate. Inasmuch as the inquiry does not indicate that the franchisor will refer business to the various franchisees, the Committee does not address the implications of Rule 2-108(B) regarding referrals.

Equally applicable might be Rule 3-102(A) forbidding a lawyer, or member of his firm, from directly or indirectly sharing legal fees with non-lawyers. One of the services to be provided by the franchisor

is the Board of Directors Support Team which includes educators who may or may not be attorneys. If the fees paid to the franchisor are based on a percentage of each case and the franchisor in turn compensates Board members from these fees, the franchisee may be indirectly sharing legal fees with non-lawyers.

A more serious problem relates to conflicts of interest regulated by Rules 4-101 and 5-102(B). Rule 4-101 prohibits a lawyer from accepting employment adverse to a client without his informed and written consent if the employment relates to a matter in reference to which the lawyer has obtained confidential information by reason of or in the course of his employment by that client or former client. Rule 5-102(B) forbids a lawyer to represent conflicting interests without the written consent of all parties concerned.

As previously noted, the franchises, as presently contemplated, will bear the name "X & Jones," "X & Smith," etc. A situation might arise in which "X & Jones" represents one party to a lawsuit against another party represented by "X & Smith." The Board of Directors could conceivably be called upon by the two separate franchisees to provide assistance in handling the matter. Thus, the franchisor, through the Board of Directors, would in effect be representing conflicting interests. The Committee therefore believes that an adequate clearing mechanism for possible conflicts would be necessary. The possible conflicts, in the Committee's view, are not simply between the franchisees, but also involve Board members who, as attorneys, may represent clients with adverse interests to clients represented by franchisees. The clearing mechanism must therefore include Board members as well as franchisees.

Since one of the services to be provided by the franchisor is centralized computer billing, the Committee believes that this too will

require appropriate screening measures given that California Business and Professions Code §6068(e) requires an attorney to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." In Opinion No. 374 this Committee stated that it is ethically proper for an attorney to use an outside computerized billing service in billing his clients so long as certain conditions are observed. Opinion 374 held that furnishing information to a central data processor necessary to maintain statistical, time and billing records is proper, so long as the conditions outlined in ABA Code of Professional Responsibility Ethical Consideration 4-3 and ABA Informal Opinion 1127 are observed.

Ethical Consideration 4-3 provides that:

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his file to an outside agency necessary for statistical, book-keeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

ABA Informal Opinion No. 1127 dealt with whether it is proper for attorneys to use a central facility for the storage of files in a computer memory such that the material would only be available to the facility's employees and the particular attorney who owned file. The Opinion held that as long as arrangements are made so that the information transmitted to the data processor is kept in confidence, and both the law firm's and the data processor's employees keep the information in confidence, there is no violation of the Canons of Ethics.

Opinion 374 did, however, caution that special circumstances may exist where the client's name or nature of the services performed

is so sensitive that ethically this information should not be disclosed to an outside agency and, in some instances, not even to other employees of the attorney. Since there is a presumption that all communications to an attorney are confidential, it is the duty of the attorney to determine that such special circumstances do not exist.

The Committee believes that attention should be given to Rule 6-101 (Failing to Act Competently) and assumes that counsel will take all steps necessary to comply with this rule.

The inquiry raises the broader question of whether franchising is a per se prohibited form of legal practice. This is a question of law on which the Committee expresses no opinion.

This opinion is advisory only. The Committee responds to specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.

OPINION NO. 424
(January 16, 1984)

DUTY OF LOYALTY-CONFLICT OF INTEREST-INSURED AND INSURANCE COMPANY. Where an insurance company asserts that a portion of a claim against the insured is not covered by the insurance policy, it is improper for a single attorney representing both the insurance company and the insured to apportion costs and fees between the issues where coverage is conceded and the issues where coverage is disputed.

AUTHORITIES CITED:

Rule 5-102

American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579 (3d Dist. 1974).

Employer's Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973)

INA v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980)

Lysick v. Walcom, 258 Cal.App.2d 136 (1st Dist. 1968)

Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976)

ABA Formal Opinion No. 282

ABA Informal Opinion No. 949

ABA Informal Opinion No. 1476

J. Blakslee, "Notes on Professional Ethics," 55 A.B.A.J. 262 (1969)

An insured has been sued on several claims. The insurer has divided the claims into the following categories: (1) claims as to which it concedes coverage; (2) claims as to which it is providing a defense under reservation of

right; (3) claims as to which it denies any responsibility and any obligation to defend. The insurer has asked the attorney to exercise his own judgment in apportioning the fees and expenses between those claims for which it is providing a defense and those for which it denies the obligation to defend. The attorney representing the insurer and insured has refused to make the allocation without the written consent of the insured, which has been denied. The insured contends that all claims are inextricably intertwined, and that coverage extends to all of them. The Committee has been asked its opinion as to whether the position taken by the attorney is correct.

An attorney hired by an insurer to represent its insured owes duties of loyalty and fidelity to both the insurer and the insured under Rule 5-102. See American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App. 3d 579 (3d Dist. 1974); Lysick v. Walcom, 258 Cal.App.2d 136 (1st Dist. 1968); INA v. Forty-Eight Insulations, 633 F.2d 1212, 1225n.25 (6th Cir. 1980); Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976); Employer's Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); ABA Formal Opinion No. 282 (interpreting ABA Canon 6). His duties to the insured prohibit him from disclosing any information to the insurer that is detrimental to the insured. Parsons, supra; ABA Informal Opinion No. 1476

(attorney is prohibited from disclosing to insurer information learned from a witness that tends to show lack of coverage); ABA Informal Opinion No. 949; J. Blakslee, "Notes on Professional Ethics," 55 A.B.A.J. 262, 262-263 (1969). As Blakslee puts it in his article, "If insurance companies need further protection from their insureds, it must come from sources other than those attorneys who represent their insureds." 55 A.B.A.J., at 263.

In requesting the attorney to exercise his own judgment in allocating his fees and costs between the claims as to which the insurer is providing a defense and the claims as to which it denies the duty to defend, the insurer is asking the attorney to create the facts and build a record that it can use against the insured. If the attorney were to accede to this request, he would be acting directly contrary to the express interests and desires of the insured. Such conduct by the attorney would breach his duty of loyalty to the insured, in violation of Rule 5-102. Although the insured has agreed to the dual representation, he has not agreed that his attorney may assist the insurance company in creating records that may be used against him.

For the foregoing reasons, this Committee is of the opinion that the attorney has acted properly in refusing to allocate his fees and costs as requested, without the consent of the insured.

This opinion is advisory only. The Committee responds to specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.

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LOS ANGELES COUNTY BAR ASSOCIATION
ETHICS COMMITTEE

FORMAL OPINION NO. 425

(JANUARY 24, 1984)

ATTORNEY AND CLIENT. It is improper for a discharged attorney to condition his delivery of deposition transcripts to his former client on the former client's paying the reporter's fees.

AUTHORITIES CITED:
Los Angeles County Ethics
Opinions Nos. 362, 360,
and 330. Academy of
California Optometrists,
Inc. v. Superior Court,
51 Cal.App.3d 999 (1975),
Weiss v. Marcus, 51 Cal.
App.3d, 590 (1975)

A discharged attorney is involved in a fee dispute with his former client. The attorney has turned over the case files to the client but has refused to release deposition transcripts concerning pending litigation because the court reporter's bill has not been paid. The discharged attorney has argued that he cannot release the transcripts until the reporter's bill is paid because until then they belong to the reporter rather than the attorney or client. We have been asked to review the propriety of this conduct.

It is a general principle in California that a former attorney is required to deliver to the client ". . . all papers and property to which the client is entitled. . . ." Rules 2-111 (A)(2) of the Rules of Professional Conduct and Academy of California Optometrists, Inc. v. Superior Court, 51 Cal.App.3d 999, 1004-06 (1975).

In Academy of California Optometrists, the client discharged its former attorney, who then refused to sign a substitution of attorney form or turn over his files until the balance of his bill was paid. The substitution of attorney was ordered by the Superior Court on the client's motion, and the Court of Appeal on a mandamus petition then ordered the discharged attorney to turn over his files .. (which included 38 depositions). The court's opinion does not tell us whether the deposition transcripts had been paid for or whether the unpaid balance was for fees only. Thus, the precise question raised in this inquiry has not been discussed by any California case of which we are aware.

Opinion No. 330 of this Committee states that the former attorney's obligation to release materials to the client include ". . . documents, including depositions, which the client has actually paid for (excluding fees for the attorney's professional services)." In this respect, Opinion No. 330 is approved by Opinion No. 362. In neither opinion was there an issue over unpaid deposition transcripts, nor any explanation of the unpaid documents concept. In reviewing

these two former opinions in light of the opinion of the Court of Appeal in Academy of California Optometrists, we conclude that the obligation of the former attorney to release materials to the client does not depend on whether the materials have been paid for by the client.

If the agreement with the reporter is that the former client alone is responsible for the cost of transcripts, then if the attorney were to hold the transcripts or return them to the reporter he would place the reporter's interest above those of his former client. If the obligation to the reporter is the attorney's, then in holding the transcripts or returning them to reporter the attorney is putting his own interest above those of his former client. As in Academy of California Optometrists, the sole benefit of the transcripts to the former attorney is the coercive effect they will have upon the client.

The transcripts are of value to the client because of the costs and delay involved in obtaining new copies (and in some situations by the loss of any annotations added by the former attorney). The attorney may not permit his interest in collecting fees or costs to become inconsistent to his client's interest (51 Cal.App.3d at 1006). The attorney's first obligation is to his client, not the court reporter, and the responsibility to the client is not eliminated by termination of the relationship or by non-payment of the attorney's fees. See L.A. Opinion No. 360 and Weiss v.

Marcus, 51 Cal.App.3d 590, 599 (1975).

This opinion is advisory only. The committee acts only on specific questions submitted ex parte, and the opinions are based only on the facts set forth in the questions presented.

FORMAL OPINION NO. 426

(APRIL 16, 1984)

AIDING THE UNAUTHORIZED PRACTICE OF LAW; EMPLOYMENT OF FOREIGN ATTORNEY NOT ADMITTED TO CALIFORNIA BAR. A California attorney may employ an attorney licensed to practice law in a foreign country but not licensed to practice law in California, in order to advise the attorney concerning the law of the foreign nation, subject to the restrictions and conditions set forth in this Opinion.

AUTHORITIES CITED:

Business and Professions Code, §§ 6125, 6126; Rules of Professional Conduct, Rules 3-101, 3-102, 3-103 and 6-101; Bluestein v. State Bar (1974) 13 Cal. 3d 162 [118 Cal. Rptr. 175]; Crawford v. State Bar (1960) 54 Cal. 2d 659 [7 Cal. Rptr. 746, 355 P.2d 490]; Farnham v. State Bar (1976) 17 Cal. 3d 605 [131 Cal. Rptr. 661, 552 P.2d 445]; Ferris v. Snively (1933) 172 Wash. 167, 19 P.2d 942; In Re McKelvey (1927) 82 Cal. App. 426; In Re Roel (1957) 3 N.Y.2d 224, 165 N.Y.S.2d 31; Johnson v. Davidson (1921) 54 Cal. App. 251; People v. Sipper (1943) 61 Cal. App. 2d Supp. 844.

The Committee's opinion has been requested concerning the ethical propriety of a California attorney employing, in California, an Iranian attorney who is not licensed to practice law in California. The purpose for employing the Iranian attorney is "as a consultant on Iranian law" (including general Iranian civil law, contracts law, family law and nationality law) and as a Farsi translator or interpreter. The California lawyer has a "basic conversational fluency in Farsi" and a

"rudimentary ability in reading and writing Farsi." He has a substantial Iranian clientele.

Specifically, the California lawyer has inquired:

"(1) May I, consistent with the California Rules of Professional Conduct, employ this Iranian attorney as contemplated above to advise and consult with me, or my clients, on Iranian law?

"(2) If so, what restrictions exist that may limit the kinds of advice, consultation or related services which he may ethically provide?

"(3) Under the California Rules of Professional Conduct, what, if any, duties of oversight or supervision of his conduct are imposed upon me?

"(4) Under these Rules, what restrictions are imposed in billing clients for services he provides?

"(5) May this attorney's name be listed on my letterhead, business cards or advertising disseminated by me, so long as he is designated as licensed solely to practice the law of Iran?

"(6) Are there any ethical restrictions on the use of this attorney's services as a Farsi translator or interpreter?"

Section 6125 of the Business and Professions Code makes it unlawful to "practice law in this State," unless the person is "an active member of the State Bar." Rule 3-101 of the California Rules of Professional Conduct provides that a California lawyer shall not "aid" any person in the "unauthorized practice of law."

Bluestein v. State Bar, (1974) 13 Cal. 3d 162, the addressed the impact of Rule 3-101 on a relationship between a California lawyer and a lawyer admitted in Europe but not in

California. In Bluestein, a California lawyer (Bluestein) had offices adjacent to an attorney (Lynas) licensed in Europe but not admitted in California. Bluestein listed Lynas as "Of Counsel" on his office door. Clients consulted with Bluestein about the imprisonment of their son in Spain on narcotics charges. Bluestein brought Lynas into the discussions and introduced him as his "associate" who was "more familiar with foreign law." Lynas met with the clients in California, accompanied them to Spain and assisted them in obtaining a Spanish lawyer. Lynas billed the clients directly and collected \$4,000.00, not shared with Bluestein. After the initial conference, Bluestein had little or no contact with the clients and exercised no supervision over Lynas' activities.

The Court held that Bluestein had "aided" Lynas to engage in the unauthorized practice of law in California. The Court, citing the New York decision in In Re Roel, 3 N.Y.2d 224 [165 N.Y.S.2d 31, 35, 144 N.E.2d 24], held that "practicing law in this State" included giving advice on the law of a foreign nation. The Court held that Lynas had engaged in the "practice of law in this State" by consulting directly with the client (with little or no supervision by Bluestein) and accompanying the clients to Spain to find a Spanish lawyer. Bluestein was suspended from the California Bar for six months, based on "aiding" Lynas in the unauthorized practice of law (as well as one other unrelated ethical violation). The Court also noted that holding out Lynas as "Of Counsel" and an "associate" was a

separate instance of "aiding" the foreign lawyer to engage in the unauthorized practice of law in California.

The In Re Roel decision, supra, relied on heavily in Bluestein, involved a lawyer admitted to practice in Mexico but not in the United States rendering legal services in New York City concerning Mexican law, principally Mexican divorce law. The New York County Lawyers Association sued to enjoin Roel from the unauthorized practice of law, alleging that his activities constituted the practice of law in New York in violation of the New York counterpart of Business and Professions Code § 6125. Attorney Roel prepared, in New York, legal papers and documents required for institution of divorce actions in Mexico and took the steps necessary to procure such divorces; gave legal advice and rendered legal services in New York concerning matters under the laws of Mexico, and prepared legal documents, contracts and other papers pertaining to Mexican law. Roel informed his clients that he was advising them only concerning Mexican law and that they should obtain a New York attorney to advise concerning New York law. The New York Court of Appeals held that this practice confined exclusively to Mexican law was "practicing law" in New York. 165 N.Y.S.2d at 38.

The Bluestein and Roel decisions show the formidable hurdles to be overcome in forming an association with a foreign lawyer in California. The question remains, however, whether the inquiring lawyer's relationship with the Iranian lawyer

could be structured so that the Iranian lawyer's activities would not constitute "the practice of law in this State." Here, unlike the situations in Bluestein and Roel, the Iranian lawyer presumably is a salaried employee of the California lawyer, could be subject to supervision by the California lawyer, would not bill directly or collect directly from the clients, could be excluded from giving advice directly to clients, and could limit his activities to advising the California lawyer on matters of Iranian law. The clients would, therefore, remain the clients of the California lawyer. If such limitations were imposed would the Iranian lawyer's giving of advice to the California lawyer in this state concerning Iranian law constitute "the practice of law in this State"? (Such advice would, presumably, include legal research performed in California, preparation of written memoranda concerning such research and related work.)

A number of California decisions have grappled with the issue of what constitutes "practicing law" for purposes of the requirement that only persons admitted to the State Bar may do so in California. People v. Sipper (1943) 61 Cal. App 2d Supp. 844; Crawford v. State Bar (1960) 54 Cal. 2d 659, 7 Cal. Rptr. 746; In Re McKelvey (1927) 82 Cal. App. 426; Johnson v. Davidson (1921) 54 Cal. App. 251.

These decisions have established that the practice of law includes not only court representation but "legal advice and counsel and preparation of legal instruments." See, e.g.,

Crawford v. State Bar, supra at 667; Farnham v. State Bar (1976) 17 Cal. 3d 605, 612, 131 Cal. Rptr. 661. Under these decisions, if the Iranian lawyer dealt directly with clients in California and advised them concerning their legal rights (even if his advice were limited to their rights under the laws of the Iran) he would be "practicing law in this State" and the inquiring California lawyer would incur liability as "aiding" the unauthorized practice of his employee.

There is a recognition in the California decisions, however, that a lawyer may employ a "clerk" or "legal assistant" who performs duties that are sometimes performed by lawyers. In In Re McKelvey, supra, a disbarred lawyer was employed by a California lawyer "to do work in his office in looking up matters of law," writing briefs and drafting pleadings. The Court held that the attorney's activities did not constitute the practice of law. 82 Cal. App. at 429. The Court noted that the disbarred lawyer had not "been attempting to do undercover that which he could not lawfully do at all," noting that he was not obtaining clients, retaining his former clients or serving them through the cover of licensed lawyers. He was paid a small salary "for his services as office assistant" with no indication that his compensation was intended to be a substitute for fees which he otherwise might have received. Id. On the other hand, in Johnson v. Davidson, supra, a law "clerk" was held to be practicing law, when she prepared pleadings and other legal documents, held conferences with clients, was compensated based

on a percentage of net profits from the practice, and even examined witnesses and prepared cases for trial. 54 Cal. App. at 254-55.

The distinction between practicing law and acting as a legal assistant was addressed in Ferris v. Snively (1933) 172 Wash. 167 [19 P.2d 942], cited in Crawford, supra, where the Washington Supreme Court stated:

"We realize that law clerks have their place in a law office, and we recognize the fact that the nature of their work approaches in a degree that of their employers. The line of demarcation as to where their work begins and where it ends cannot always be drawn with absolute distinction or accuracy. Probably as nearly as it can be fixed, it is sufficient to say that it is work of a preparatory nature, such as research, investigation of details, the assemblage of data and other necessary information and such other work as will assist the employing attorney in carrying the matter to a completed product, either by his personal examination and approval thereof or by additional effort on his part. The work must be such, however, as loses its separate identity and becomes either the product, or else merged in the product of the attorney himself." 19 P.2d at 945-46.

Under these authorities, the Committee believes that it is proper for a California lawyer to employ an Iranian lawyer, not admitted in California, to render assistance to the California lawyer concerning matters of Iranian law. In order to avoid "aiding" the Iranian lawyer in the unlawful practice of law in California, however, such employment must, in the Committee's view, be subject to all of the following restrictions and conditions:

(1) The Iranian lawyer must confine his role to rendering assistance to the California lawyer, with the California lawyer maintaining responsibility for all legal matters on which the Iranian lawyer works and advising the clients concerning their legal rights and duties.

(2) The California lawyer must not in any way communicate to clients or the public that the Iranian lawyer is acting as a lawyer, is admitted to practice or is practicing law in California, nor should the Iranian lawyer's name appear on the inquiring lawyer's letterhead, business cards or office designation. It is well established that "the mere holding out by a layman that he is practicing or is entitled to practice law constitutes the "unauthorized practice of law." In Re Cadwell (1975) 15 Cal. 3d 762, 777 [125 Cal. Rptr. 889]; Farnham v. State Bar (1976) 17 Cal. 3d 605 [131 Cal. Rptr. 661]; Bluestein v. State Bar, 13 Cal. 3d 162, 175, n.13 [118 Cal. Rptr. 175].

(3) To the extent that the California lawyer's advice to his clients is based wholly or in part on the advice he receives from the Iranian lawyer, the California lawyer must take steps to assure himself of the accuracy of that advice. Otherwise, the California lawyer risks being treated as a mere "conduit" or "stand-in" for the practice of law by the Iranian lawyer, and thereby risks both ethical violations (Rules 3-101 and 6-101) and malpractice exposure. Such steps should include substantial knowledge by the California lawyer of the back-

ground, education, competence and honesty of the Iranian lawyer and the ability, personally or in consultation with others, to evaluate his competence with respect to Iranian law.

(4) All billing for matters worked on by the Iranian lawyer should be made by the inquiring lawyer direct to the clients. There is no prohibition against billing for work done by the Iranian lawyer, just as there is no prohibition against billing for the time of other legal assistants, including paralegals and secretaries. The inquiring lawyer should make sure, however, that his compensation of the Iranian lawyer not violate the rules against sharing legal fees with a non-lawyer (Rule 3-102(A)), giving referral fees (Rule 3-102(B)) or forming a partnership with a non-lawyer, part of whose activities include the practice of law (Rule 3-103). The safest such arrangement would be a fixed salary at a level reasonably related to the services provided by the Iranian lawyer. Any compensation arrangements which include sharing of profits or compensation based on the volume of business referred by the Iranian lawyer would risk violation of Rules 3-102 and 3-103.

(5) The Committee believes there are no restrictions on the inquiring attorney's use of the Iranian attorney as a Farsi translator or interpreter. Again, however, the inquiring attorney must take care that the compensation is reasonably related to services actually performed in the capacity of translator or interpreter, and not disguised compensation for referral of legal business or services as an attorney.

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427

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✱ Opinion No. 427 (June 18, 1984)

ATTORNEY & CLIENT: CONFLICTING INTERESTS-DISCLOSURE. Dual representation of potential conflicting interests is proper after full disclosure and informed consent.

AUTHORITIES CITED:

Rules of Professional Conduct, Rule 5-102(B);
Spindle v. Chubb/Pacific Indemnity Group,
89 Cal.App.3d 706, 152 Cal.Rptr. 776 (1979);
Klemm v. Superior Court, 75 Cal.App.3d 893,
142 Cal.Rptr. 509 (1977);
Ishmael v. Millington, 241 Cal.App.2d 520,
50 Cal.Rptr. 592 (1966);
L.A.C.B.A. Opinion No. 395.

An Attorney has inquired about the propriety of representation involving the following facts:

In 1981 Attorney was president of Company A (A), a competitor of Company B (B). At that time B was in the business of renting and maintaining private airplanes. Attorney began to represent B during this period. B's officers knew of the possibility that conflicts between the two corporations could arise but chose to waive them. The Attorney and B entered into a retainer agreement which specifically described Attorney's interest in A and the potential that conflicting interests could arise in the course of representing B. Pursuant to the written retainer agreement, Attorney performed various litigation and non-litigation services for B. The retainer agreement with B has never been terminated or rescinded.

In December, 1982 B's president was arrested on an unrelated criminal matter and the day-to-day management of B was taken over by interim management of B's shareholders.

In January, 1983 B's shareholders entered into a written agreement with Company C (C), an entity in which Attorney has no connection, for C to purchase B's stock. Later that month, Attorney and X (the other shareholder of A) purchased some of the outstanding shares of B in an effort to obtain control of B. B called a shareholders meeting for February 4, 1983 to approve the C/B agreement. X and Y (the holder of the proxy to vote B shares held by Attorney and X) attended the meeting. The shareholders voted to rescind the agreement with C and to enter into a management agreement with Y's company, Company D (D). During the period that C managed B's assets (apparently from January 10, 1983 when the agreement was originally entered into until February 4, 1983 when it was rescinded), a plane left B's facilities and flew to San Francisco. On the February 6, 1983 return flight the plane crashed, killing all four occupants. After February 6, 1983 the management function in the D/B agreement was taken over by Company E (E) whose shareholders were Attorney, X, Y, and Z. E eventually took over the management of all of B's operating assets.

After the accident, claims were made to the various insurers. Insurance Company No. 1 (No. 1), B and C's insurer, refused to pay on the ground that B's policy had been surrendered on January 10, 1983 by interim management when C took over B's operation. Insurance Company No. 2 (No. 2), A's insurer, refused payment on the ground that there was no coverage.

In March, 1983 Attorney sold to X his shareholdings in E and withdrew from any activities in connection with the operation of A or E. Attorney did represent X in connection with his examination by A's insurer. In July, 1983 the estate of two of the passengers filed suit. Some of the defendants include A, B, C and E. Attorney, while representing A and E, sent a copy of the complaint to No. 1 asking it to defend A and E. No. 1 commenced defending A. While representing B, Attorney sent a copy of the complaint to No. 2 asking it to represent B.

B wishes to be represented by Attorney. The corporations with whom Attorney may have conflicting interests, A, B and E, have each given Attorney a written waiver regarding any conflict. Some of the parties adverse to B, No. 2 and C, contend that Attorney's exposure to conflicting interests may disqualify him from representing B in this action.

Attorney seeks to know whether any disqualifying conflict remains after the clients waived possible conflicts. Attorney does not believe that his representation should be affected by his being a witness to the events at issue in the litigation as he did not observe the crash nor did he observe the leasing, renting or maintenance of the airplane and is not a percipient witness to the acts or omissions alleged in the complaint.

DISCUSSION

Rule 5-102(B) of the California Rules of Professional Conduct provides:

A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

Rule 5-102 permits dual representation where there is a full disclosure and informed consent by all parties, at least where the representation concerns agreements and negotiations prior to trial. See e.g., *Gregory v. Gregory*, 92 Cal.App.2d 343, 349 (1949). Even though informed consent may be obtained, Rule 5-102 does not permit dual representation of conflicting interests at a trial or hearing when there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another. See *Klemm v. Superior Court*, 75 Cal.App.3d 893, 898 (1977) and cases cited therein; *Spindle v. Chubb/Pacific Indemnity Group*, 89 Cal.App.3d 706, 713 (conflicting interests between jointly represented clients arises whenever the attorney's representation of one client is rendered less effective because of his representation of the other). Where the conflict is merely potential and not "actual, present and existing," dual representation is proper at a hearing or trial after full disclosure to and informed consent by the clients.

Representation of clients with divergent interests imposes upon an attorney the highest duty to make full disclosure of all facts necessary for the parties to make an informed decision regarding the litigation, including areas of potential conflicts and the possibility and desirability of obtaining independent legal advice. *Ishmael v. Millington*, 241 Cal.App.2d 520, 528 (1966).

Assuming that Attorney has met his obligations under *Ishmael*, *supra*, and the parties have given their written informed consent, the Committee believes that Attorney's dual representation is proper since there is no actual conflict present. Cf. L.A.C.B.A. Opinion No. 395.

Opinion No. 428 (September 18, 1984)

ATTORNEY AND CLIENT. It is improper for an attorney to advertise in a charitable organization's newsletter or magazine that he will write a will or a codicil for free on condition that the testator include the organization as a beneficiary.

AUTHORITIES CITED:

Opinion Nos. 196, 298, and 314.

ABA Ethics Opinion Nos. 831 and 1288.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

An attorney who is a member of a charitable organization proposes to place an advertisement in the organization's newsletter or magazine. The attorney will offer in the advertising to draft a free will or a codicil to a

429

will if the organization is included as a beneficiary of the will.

In previous opinions with similar fact patterns the Committee has stated that such conduct by a lawyer is improper. See Opinion Nos. 196, 298, and 314. However, these opinions were promulgated prior to the decision in Bates v. State Bar of Arizona 433 U.S. 350 (1977), and turned at least in part on the impropriety of an attorney's advertising or solicitation of business. In Bates the Supreme Court held that no restriction may be placed on truthful advertising concerning the availability and terms of an attorney's services.

It is the Committee's opinion that, notwithstanding Bates, it is still improper for an attorney to advertise the drafting of a will or codicil at no charge in return for a bequest to a charitable organization. The attorney would be unable to give independent advice to his client, the testator, as to the contents of the will or codicil, because he might be influenced by his desire to obtain bequests for the charitable organization. Such influence may adversely affect the attorney's ability to represent the client properly. Loyalty and undivided representation are essential to an attorney's interaction with his client. In Opinion No. 314 the Committee stated:

A group of lawyers may not agree to draw free wills making a bequest to their church. Their desire to help the church might prevent them from giving unbiased advice to the testators.

This principle applies to all charities. Cf. ABA Informal Opinion Nos. 831 and 1288.

However, an attorney may draft a proposed bequest clause which may be turned over to the testator's independent attorney for consideration and insertion into a will or codicil. In this manner the attorney would be promoting the charity's cause and providing a service to the testator without involving himself in an improper conflict of interest. See Opinion No. 298.

Opinion No. 429 (October 15, 1984)

CONDUCT OF PROSECUTOR WHO DOES NOT BELIEVE IN HER CASE. If a member of the State Bar in government service having responsibility for prosecuting criminal charges becomes aware that those charges are not supported by probable cause, she promptly shall advise the court in which the matter is pending. If the court then determines that probable cause does exist, the prosecutor may continue to present the case.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rule 7-102 and Rule 2-111(B).

A prosecutor, in the jury trial of a criminal prosecution, put on her first witness. After the witness' direct testimony, the prosecutor asked the court to dismiss the case in the interest of justice under Penal Code §1385. The court denied the motion.

After the completion of the prosecution and defense cases, the prosecutor renewed the motion under §1385. The court again denied the motion.

The prosecutor then conferred with her superiors who instructed her to argue the case despite her opinion of it. We are told in the inquiry that the prosecutor continued to believe that one could not reasonably believe from the evidence and testimony that the defendant had committed the crime of which he was accused. We are asked whether these circumstances make it proper for the prosecutor to argue the case or whether she instead should again urge dismissal, refuse to argue the case, or take some other action.

This situation is covered by the California Rules of Professional Conduct, Rule 7-102. The first sentence of the rule deals with prosecutors' conduct in instituting criminal charges. The second sentence deals with their conduct after the charges have been instituted:

"If, after the institution of criminal charges, a member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, he shall promptly so advise the court in which the criminal matter is pending."

Here, the prosecutor has complied with this requirement so long as she has fully and fairly described the reasons and factual basis for her motion to dismiss. If so, her ethical obligation in this regard was satisfied. The existence of probable cause is not subject to precise measurement, and opinions can vary between prosecution and defense, within the prosecutors' office, and sometimes between the prosecution and the court. When the court determines that probable cause did exist, it was proper for the prosecutor to complete the presentation of the case so long as there was no basis for mandatory withdrawal under Rule 2-111(B).

Opinion No. 430 (October 15, 1984)

AFFILIATION WITH LAW FIRM IN ANOTHER COUNTRY-DESCRIPTION OF RELATIONSHIP ON LETTERHEAD. Reference on letterhead to "Correspondent Firm" in another county is proper if clear statement of firm's independence is also included.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rule 2-101(A)(2);
Los Angeles Formal Opinion 392.

A Los Angeles County law firm engaged in general civil practice ("LAC") is contemplating a relationship with an Orange County law firm specializing in litigation ("OC"). LAC requests the Committee's opinion as to the propriety of a proposed reference to the relationship on the firm's letterhead.

The anticipated relationship involves an agreement whereby OC would provide office space within its facilities for a branch of LAC and LAC would do the same for OC at LAC's offices in Los Angeles. The two firms also contemplate a mutual referral of business in their respective areas of practice. In all other respects it appears that the firms would operate independently. LAC proposes that its letterhead include its own Orange County branch office address and telephone number and that, in addition, OC be listed on the letterhead as a "Correspondent Firm."

BP# 430

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 430

October 15, 1984

AFFILIATION WITH LAW FIRM IN ANOTHER COUNTY-
DESCRIPTION OF RELATIONSHIP ON LETTERHEAD.
Reference on letterhead to "Correspondent Firm" in
another county is proper if clear statement of
firm's independence is also included.

AUTHORITIES CITED: California
Rules of Professional Conduct,
Rule 2-101(A)(2); Los Angeles
Formal Opinion 392.

A Los Angeles County law firm engaged in general civil practice ("LAC") is contemplating a relationship with an Orange County law firm specializing in litigation ("OC"). LAC requests the Committee's opinion as to the propriety of a proposed reference to the relationship on the firm's letterhead.

The anticipated relationship involves an agreement whereby OC would provide office space within its facilities for a branch of LAC and LAC would do the same for OC at LAC's offices in Los Angeles. The two firms also contemplate a mutual referral of business in their respective areas of practice. In all other respects it appears that the firms would operate independently. LAC proposes that its letterhead include its own Orange County branch office address and telephone number and that, in addition, OC be listed on the letterhead as a "Correspondent Firm."

The ethical propriety of the form and content of a law firm's letterhead is governed by the general provision of Rule 2-101(A)(2) which requires that a communication by or on behalf

of a member of the State Bar shall not contain any matter in a manner or format which tends to confuse, deceive or mislead the public. The question here presented is whether the proposed letterhead designation is misleading with respect to the relationship between the firms and, specifically, whether it might lead to the erroneous assumption by the public that the clients of one firm would in effect be regarded and treated as clients of the other firm.

In L.A. Formal Opinion 392 (Revised September 21, 1983), this committee approved a letterhead reference to a relationship between a California law firm and an independent Washington, D.C. law firm in which the firms were described as "affiliated" but "independent." As here, the relationship described in that opinion involved a forwarding arrangement and a mutual accommodation in the use and availability of office facilities and services. A significant factor cited for the conclusion that the letterhead was not misleading was that the distinct geographical location of the two firms would make it unreasonable for a client to assume a general or on-going involvement in his affairs by the "affiliated" firm. *Id.* at pp.9-10.

The proposed use of the term "correspondent firm" does not appear to differ materially from the term "affiliated firm" as a description of the kind of on-going relationship contemplated by this inquiry. However, particularly in view of the close geographical location of LAC and OC and the proposed arrangement as to common office space, compliance with Rule 2-101(A)(2) requires that any letterhead designation include a clear statement of the "correspondent firm's" independent status.

With this modification, the committee believes that the proposed letterhead reference would be ethically proper.

Revised Formal Opinion 392 also addressed at length the question whether and under what circumstances the clients of one firm must be attributed to another affiliated firm for purposes of evaluating potential conflict of interest problems. Based upon the facts as presented in the instant inquiry, the relationship between LAC and OC appears to be sufficiently independent to avoid any question of client attribution. For a complete analysis of the factors and considerations regarding this aspect of an affiliation relationship with another law firm reference is made to Revised Formal Opinion 392 at pp. 4-8.

The committee acts only with reference to specific questions submitted ex parte; and its opinion, which is advisory only, is based on such facts as are set forth in the question submitted.

Opinion # 431

10-15-84

The ethical property of the form and content of a law firm's letterhead is governed by the general provision of Rule 2-101(A)(2) which requires that a communication by or on behalf of a member of the State Bar shall not contain any matter in a manner or format which tends to confuse, deceive or mislead the public. The question here presented is whether the proposed letterhead designation is misleading with respect to the relationship between the firms and, specifically, whether it might lead to the erroneous assumption by the public that the clients of one firm would in effect be regarded and treated as clients of the other firm.

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Opinion No. 431 (October 15, 1984)

FEE SPLITTING. A Law Firm may not enter into an arrangement with another party, whereby the other party shares in the legal fees paid by its client for legal services rendered by the Law Firm.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rules 2-107(a) and 3-102;
Los Angeles County Bar Opinion No. 391.

The Ethics Committee has been asked to formulate an opinion in relation to the following facts:

A partner of a law firm states that a business manager for clients of the entertainment industry and other areas

has formed a privately held firm (Business Firm) which proposes to retain on behalf of its clients a Los Angeles law firm (Law Firm) to advise the clients and to review their documents and contracts. Business Firm would not hold itself out as rendering legal services.

Law Firm would maintain an attorney-client relationship with the clients who would remain ultimately responsible for payment to Law Firm; however, Business Firm would be primarily responsible for payment to Law Firm. Business Firm would advance a non-refundable retainer to be applied against the fees billed monthly by Law Firm and promptly pay or advance all out of pocket costs and disbursements incurred or to be incurred by Law Firm.

Law Firm would bill the clients at a fixed hourly rate for services rendered by all legal and support staff of Law Firm. The hourly rate would be substantially less than the hourly rate charged by partners of Law Firm but substantially more than that charged by associates, law clerks and paralegals of Law Firm.

While not part of any understanding or agreement involving Law Firm, it has been made known to Law Firm that Business Firm intends to charge the clients 20% over the hourly rate agreed to by Business Firm and Law Firm. Thus to the extent that the number of service hours rendered by Law Firm to the clients exceeds 20 hours in any month, Business Firm would be receiving an override. It is claimed that to the extent that the number of service hours rendered is less than 20 hours in any month, Business Firm would be subsidizing the legal costs of its clients. It is also claimed that the number of service hours to be rendered to clients in a particular month cannot be determined in advance as the number of clients and their need for legal services would vary each month.

Legal services rendered by Law Firm to the clients other than advice and the reviewing of documents and contracts, namely litigation, acquisitions, reorganizations and mergers, would be negotiated on a client by client and case by case basis. A customary form letter of retainer and fee agreement embodying the foregoing would be executed between Law Firm and the client and between Law Firm and Business Firm.

Finally, Business Firm has offered to sell at a nominal cost 5% of Business Firm's stock to the head partner of Law Firm and has requested that the partner serve on Business Firm's Board of Directors. The partner has tentatively declined to serve on the Board of Directors, but requests an opinion with respect to the effect of owning 5% of Business Firm's stock and serving on its Board of Directors.

In the opinion of this Committee the proposed arrangement between Law Firm and Business Manager is ethically improper.

Rule 3-102 of the California Rules of Professional Conduct prohibits an attorney from directly or indirectly sharing legal fees with anyone except another attorney.

The 20% fee override that Business Manager will receive, based solely on the number of service hours rendered by Law Firm to the clients is a clear case of fee splitting in violation of Rule 3-102.

Rule 2-107(a) of the California Rules of Professional Conduct prohibits an attorney from collecting or entering into an agreement to collect an illegal or unconscionable fee. If the fee charged disproportionately exceeds the quality or amount of legal services rendered so as to shock

the conscience of ordinarily prudent attorneys practicing in the community, the fee would be unconscionable.

The proposal to charge a fixed hourly rate for services rendered by all legal and support staff of Law Firm, including attorneys, law clerks, paralegals and secretaries presents a potentially serious possibility of charging an unconscionable fee. However, without knowing the actual fee charged by Law Firm, and the nature of the services, it would not be possible to give an opinion concerning whether a fee is unconscionable.

The proposal to charge a fixed hourly rate for legal and support staff of Law Firm may also result in charging an illegal fee in violation of Rule 2-107(a). Billing such support staff time as part of a fixed legal rate without full disclosure identifying it as non-attorney time, is a violation of Rule 2-107(a) because it fraudulently misrepresents to the client that legal services have been rendered by an attorney (Los Angeles County Bar Opinion No. 391).

Because the clear violation of Rule 3-102 renders the proposed arrangement unethical, the Committee will not address numerous other ethical problems raised by the inquiry.

Opinion No. 432 (December 17, 1984)

CONFLICT OF INTEREST: DUAL REPRESENTATION OF ADVERSE PARTIES IN LITIGATION—PREPARATION OF PLEADING AS REPRESENTATION—CONSENT. It is improper for a lawyer for the plaintiff in an action to prepare an answer to be filed by the defendant in pro persona unless there is informed consent in writing by all adverse parties involved.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rules 5-102(B), 5-104(A)(3);
Rule 1.7(a) ABA Model Rules of Professional Conduct;
L.A. Opinion No. 395;
Editor's Note, L.A. Opinion No. 108.

The following hypothetical case is stated.

After being served with summons and complaint in an action for damages for malicious prosecution two of the three defendants in the case contacted plaintiff's lawyer by telephone and told him they had given false evidence against his client in the prior criminal proceeding on which the malicious prosecution action was based.

The lawyer sent his office investigator (not an attorney) to interview the two defendants; they recounted to him their story of having lied in the criminal case and being induced to do so by the third defendant, plaintiff's former wife. Two weeks after this interview the investigator presented the two defendants with typed declarations which they signed under penalty of perjury stating that their prior charges against the present plaintiffs were all false. At the same time the investigator presented defendants with formal answers to be filed by them in the malicious prosecution action in pro persona. The answers had been prepared by plaintiff's lawyer and admitted the charging allegations of the malicious prosecution complaint but denied the damages allegations. The two defendants signed these answers which were then returned by the investigator to the lawyer's office where copies were mailed to counsel for the third defendant, the main target

of the damages action. The affidavit of mailing showed the office address of plaintiff's lawyer and the lawyer acknowledged receipt of copies of these answers on the proof of service form attached to the original answers filed with the court. Plaintiff's lawyer paid the filing fees for both answers. It is not known whether he ever met personally with the two defendants before preparing, serving and filing their answers.

At the trial of the malicious prosecution action the two defendants appeared as witnesses only; they testified that their prior charges in the criminal case against plaintiff were all false. Plaintiff sought and obtained a verdict against the third defendant only.

We are asked whether it was improper for plaintiff's lawyer to have prepared, served and filed answers on behalf of these two defendants and paid the filing fees for them.

Rule 5-102(B) California Rules of Professional Conduct provides that a member of the State Bar shall not represent conflicting interests except with the written consent of all parties concerned. This prohibition is also found in Rule 1.7(a) ABA Model Rules of Professional Conduct* where under "Comment" it is stated that the rule forbids representation of opposing parties in litigation.

It appears to the Committee that plaintiff's lawyer was representing the two defendants in this case when he prepared their formal written answers even though he did not do so as attorney of record. The additional facts here with respect to service and filing, including the payment of filing fees which is permissible as an advance of costs under Rule 5-104(A)(3), are further evidence that the lawyer was acting for the answering parties.

His failure to present a case either for or against them at the trial does not appear to be significant as either adding to or detracting from the force of this evidence.

That plaintiff and defendants had conflicting interest there can be no doubt. Not only did their interests conflict on the issue of damages, but it was clearly in plaintiff's interest that defendants admit to having lied in the prior proceeding while such an admission made them vulnerable to a criminal charge of perjury.

The question we must then address is whether there was such consent shown that plaintiff's lawyer could properly represent both plaintiff and defendants in the litigation.

Consent has been construed not as sanctioning dual representation in every case where it appears, but only as providing a possible exception to the general prohibition against an attorney's representing conflicting interests in some cases. There is some doubt that consent, even if fully informed, can justify dual representation of adverse parties when a controversy is in litigation, there is an actual, present, existing conflict, and the discharge of duty to one party conflicts with the duty to the other. L.A. Opinion Nos. 395 and 427; *Klemm v. Superior Court*, 75 Cal.App.3d 893, 898, 142 Cal.Rptr. 509, 512 (1977). Also see Editor's Note, L.A. Opinion No. 108.

We do not reach that question, however, since there is no indication that any attempt was made by the lawyer in this case to explain to either plaintiff or the defendants the conflicts involved so as to insure that their consents, if given, would be informed and knowledgeable. Similarly there is no indication that consent, if intended, was ever put in writing.

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LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

OPINION NO. 432

(DECEMBER 17, 1984)

LOYOLA LAW SCHOOL

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LAW LIBRARY

CONFLICT OF INTEREST - DUAL REPRESENTATION OF
ADVERSE PARTIES IN LITIGATION - PREPARATION OF PLEADING
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*Though widely debated and adopted by the American Bar Association these Rules are not binding in California.

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We conclude that the lawyer's conduct was a clear violation of Rule 5-102(B). In self justification the lawyer states that he was never serious about getting a money judgment against the two defendants for whom he prepared answers, that he wanted only to obtain a large money judgment against the third defendant. This does not appear to us to justify a violation of the Rules of Professional Conduct, it rather makes the violation the more egregious inasmuch as the lawyer could have accomplished his stated objective without ethical impropriety in a number of ways, e.g. by taking the depositions of the recanting defendants, taking their defaults but vacating the judgments against them, or simply dismissing the action against them and proceeding against the third defendant alone. The lawyer could thus have easily avoided being in a position of conflicting loyalties where defendants as well as plaintiff could readily have been relying on him as their attorney.

This opinion is advisory only. The Committee acts only on specific questions submitted to it ex parte, and the opinions are based only on the facts set forth in the questions presented.

433

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Opinion No. 433 (November 19, 1984)

THE SALE OF A CLIENT'S ASSETS DOES NOT MAKE THE BUYER A CLIENT FOR PURPOSES OF RULE 4-101. The attorney-client relationship is personal to the client. It does not pass to the purchaser of all or some of the client's assets merely because the attorney performed services with regard to the assets before or as part of the sale.

AUTHORITIES CITED:

California Rules of Professional Conduct Rule 4-101;
Global Van Lines, Inc. v. Superior Court,
 144 Cal.App.3d 483 (1983);
SMI Industries, Canada, Ltd. v. Caelter Industries, Inc.,
 586 F.Supp. 808 (N.D.N.Y. 1984);
In re Yam Processing Patent Validity Litigation,
 530 F.2d 83 (5th Cir. 1976);
Beghin-Say v. Rasmussen, 212 U.S.P.O. 615
 (Comm. Dec. 1980).

FACTS

Members of a law firm, while partners in another firm, represented a newly formed corporation and several of its principle shareholders in the leveraged acquisition of the stock of another corporation ("Subsidiary"). At the time of the acquisition, the Subsidiary was the wholly owned subsidiary of the Seller. In the acquisition, and since then, the attorney's prior firm, and now their current firm (the "Firm"), have performed a variety of legal services for the Subsidiary, its new parent, and some of the shareholders of the new parent.

A deteriorating financial situation has required the Subsidiary to sell substantially all of its assets. One of the assets sold was real property which had been pledged by the Subsidiary to secure a promissory note; the note was given by the Subsidiary and its new parent to the Seller as part of the leveraged acquisition. The person buying this real property (the "Buyer") agreed to assume all of the obligations under the promissory note.

The Subsidiary has executed a general assignment for the benefit of its creditors in favor of a credit association.

The credit association and the creditors committee which advises it both are represented by separate counsel, but the Firm has assisted them in the orderly transfer of the Subsidiary's assets to the credit association. The credit association has reimbursed the Firm for its out of pocket expenses and has paid a small amount of fees for corporate work done by it with regard to the Subsidiary after the assignment.

The Firm presents a potential conflict issue because the credit association now has filed suit against the Seller seeking to set aside the Subsidiary's promissory note and trust deed as a fraudulent conveyance. The Firm has been requested by the new parent and its shareholders to represent all of them in any lawsuit arising from this fraudulent conveyance action. This representation would include defending a lawsuit which it is likely the Seller will bring against the new parent on the promissory note, and against one of the shareholders on his guarantee of the promissory note.

The request of representation almost certainly would require the Firm to take positions adverse to those taken by the credit association, including the possibility of its defending the validity of the note which the credit association seeks to invalidate, and defending distributions previously made from the Subsidiary. We are asked whether Rule 4-101 of the Rules of Professional Conduct prohibits the Firm from accepting this representation because of the adverse positions it would have to take as regards to the credit association.

DISCUSSION

Rule 4-101 states that:

"A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

There are several possible bases for concluding that Rule 4-101 has been triggered by these facts, and that the Firm cannot proceed without the informed and written consent of the credit association. First, the Firm performed some work for the credit association after the assignment of assets. Whether or not the credit association might be considered a client, the Firm obtained no confidential information "...by reason of or in the course of [this employment]...." To the contrary, the described facts are that all information went from the Firm to the credit association in order to effect the assignment of assets made by the Firm's client.

Second, we are asked to compare this situation to the one that the Firm would face if the new parent had sold the stock of the Subsidiary instead of the Subsidiary selling its assets. We are aware of no authority to support this argument. We conclude that there is a substantial difference between the sale of assets and the sale of the entity itself. In the latter, not only would the Firm be appearing against the former client, which fits within the literal terms of Rule 4-101, but in addition, it would have knowledge of the workings and attitudes of the entity itself. See, for example, Global Van Lines, Inc., v. Superior Court, 144 Cal.App.3d 483, 489 (1983) in which the court presumed that a corporation's former general counsel had: "...acquired

substantial knowledge of the policies, attitudes and practices of [the corporation's] management...."

Third, we are asked whether this situation can be analogized to a bankruptcy. The bankruptcy analogy we find to be inapplicable; bankruptcy is the same company as before. In addition, bankruptcy involves a number of factors which differ from the assignment for the benefit of creditors.

The analogy we find most persuasive is to the sale of specific corporate assets. See, for example, SMI Industries, Canada, Ltd. v. Caelter Industries, Inc., 586 F.Supp. 808 (N.D.N.Y. 1984) [citing In re Yam Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976) and Beghin-Say v. Rasmussen, 212 U.S.P.O. 615 (Comm. Dec. 1980)]. In the SMI Industries case, a party was involved in litigation concerning patents it previously had sold to another party. It was represented by the attorneys who had prosecuted the patent application for it, and their disqualification was sought. The argument, in effect, was that the sale of the assets somehow included a sale of the confidential relationship arising from the work the attorneys previously had done with regard to those assets. The court rejected this under the New York ethics rule, finding that no confidential relationship existed between the attorneys and the corporation that had bought the patents, and that the purchaser was not a "former client."

Opinion No. 434

DONATION OF LEGAL SERVICES AND COSTS-FREE PATENT APPLICATION AND PATENT PROSECUTION AS CONTEST PRIZE. Donation of legal services and costs for patent prosecution as prize to high-school contest winner is not improper if services are rendered on a purely charitable basis and if attorney represents that all communications regarding services are truthful and accurate, avoids representation of conflicting interests, and otherwise complies with Rules of Professional Conduct.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rules 2-101, 2-101(D)(1), 5-102, 5-104(A)(3);
American Bar Association Model Rules of
Professional Conduct, Rules 1.8(e), 6.1;
Former American Bar Association Disciplinary Rule
5-103(B) and Ethical Considerations 5-7, 5-8;
California Formal Opinions 1976-38, 1982-65;
Los Angeles County Bar Formal Opinion 379;
San Francisco County Bar Informal Opinion 1974-4.

A law firm specializing in intellectual property matters wishes to sponsor a local high school invention fair as a way to "promote inventiveness and to teach the students a little about what they can and should do with their ideas." The firm requests this Committee's opinion as to the propriety of donating its services to help contest winners secure patents for their inventions. Each prize would consist of a patent application and prosecution, including all expenses associated with securing the patent, if it is possible to obtain one.

There is no provision of the State Bar Act or the Rules of Professional Conduct expressly prohibiting the donation of legal services as a contest prize. Indeed, the firm's

goal in sponsoring the fair and donating its services appears to be consistent with recognized ethical and policy considerations which encourage attorneys to participate in civic programs and pro bono activities designed to educate and benefit the public. See California Formal Opinion 1982-65, at p. 7; Rule 6.1, American Bar Association Model Rules of Professional Conduct.

California Formal Opinion 1982-65 approved a lawyer's donation of legal services to a nonprofit organization for auction. Noting the lack of an express prohibition on such conduct, the committee there concluded that the donation was proper in theory; but cautioned that the attorney had the responsibility of assuring that the Rules of Professional Conduct were fully complied with. Assuming careful attention by the attorney to basic ethical considerations such as the prohibition against false or misleading descriptions of services (Rule 2-101) and the avoidance of representation of conflicting interests, the committee found the proposed donation to be unobjectionable. *Id.* at p. 7.

The law firm's proposal to donate its services in this case appears to be equally permissible and appropriate, assuming diligence on the part of the attorneys regarding compliance with applicable Rules of Conduct. For example, the attorney must be certain not to give any guarantee of the success of a patent application [See standard (1) adopted under Rule 2-101(D)] and must take measures to avoid a conflict of interest involving other clients of the firm. In this regard the extensive discussion of relevant considerations in California Formal Opinion 1982-65 provides important guidance, and the Committee suggests further reference to that opinion by the inquiring attorneys here.

The law firm's proposal to pay all expenses associated with the patent prosecution presents a different and more difficult question. Rule 5-104(A)(3) of the State Rules of Professional Conduct allows an attorney to advance the costs of prosecuting a claim, provided that the client remains ultimately liable for all costs. California Formal Opinion 1976-38, at p. 2. The rule, however, does not require an attorney to evaluate the client's ability to re-pay advanced costs nor to make particular efforts to collect from the client. *Id.**

The rationale behind the prohibition against paying the client's litigation costs is to avoid the possibility that the attorney's independent judgment might be impaired if he or she had a financial interest in the outcome of the case. See Former ABA Ethical Considerations 5-7 and 5-8. This concern is insignificant when an attorney pays litigation expenses during pro bono work performed for charitable purposes. Recognizing the special nature of such pro bono service, the Ethics Committee of the San Francisco County Bar has held that an attorney may pay costs for a client being represented on a charitable basis:

"Where an attorney does not anticipate any form of reimbursement from a client with a legitimate claim and his services are rendered on a purely charitable basis, the ABA and State Bar prohibitions of financial interests appear to be inapplicable to the assumption of litigation costs." San Francisco County Bar Informal Opinion 1974-4, at p. 3.

The opinion cautions, however, that "[i]t must be clearly established that in undertaking a charity case, the attorney involved does not seek to thereby establish an attorney-client relationship with the expectation that such

434

MATION THAT MY AUTHORIZED REPRESENTATIVE MAY OBTAIN FROM ME OR FROM OTHER SOURCES. I UNDERSTAND THAT MY SIGNATURE BELOW GIVES MY AUTHORIZED REPRESENTATIVE PERMISSION TO RELEASE ANY INFORMATION TO DPSS TO ALLOW DPSS TO LOOK AT THE CASE FILE AND TO TALK TO DPSS ABOUT THIS CASE. I ALSO AGREE THAT MY SIGNATURE BELOW IS A WAIVER OF MY ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PRIVILEGE WITH RESPECT TO THIS CASE AND THIS REPRESENTATIVE AND THE COUNTY.

I HAVE READ AND UNDERSTAND THE ABOVE.

ISSUE

May an attorney bid on or enter into a contract which incorporates the above conditions without violating his ethical responsibilities to the client?

DISCUSSION

The essence of the consent form which the attorney must have the GR recipient sign is that the attorney may divulge to the county any information which the recipient provides the attorney. The Committee believes that this provision runs afoul of several ethical considerations.

An attorney has a duty of undivided loyalty to his client. Commercial Standard Title Co. v. Superior Court, 92 Cal.App.3d 934, 945, 155 Cal.Rptr. 393 (1979). This duty is reflected in California Business & Professions Code §6068(e) which requires an attorney "[t]o maintain inviolate the confidences, and at every peril to himself to preserve the secrets, of his client." Only the client can release the attorney from the obligation and only after full disclosure. LACBA Opinion No. 403 (1982); ABA Rule 1.6(a). "Confidence" refers to information protected by the attorney-client privilege and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client. LACBA Opinion No. 358 (1976) (relying on former ABA DR 4-101(A)).

Given the information which the attorney must elicit from the recipient in order to adequately represent him, e.g., all sources of income, number of household members, personal assets, etc., the attorney may discover resources which were not reported to DPSS and which, if known, may affect both the recipient's eligibility for SSI benefits and continued GR assistance. The attorney is therefore in the middle of an adverse relationship between the county and his client. The attorney cannot "maintain the secrets of his client" and at the same time comply with the contractual requirements imposed by the county unless he fails to ask pertinent questions for fear that he may be required to divulge the information to the county. In this instance, however, the attorney would not be adequately representing the client and might jeopardize the client's chances of a favorable SSI determination. See, e.g., City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 235, 231 P.2d 26 (1951) (unless the client makes known to the lawyer all the facts, the lawyer's advice will be useless, if not misleading).

This Committee has stated that "every client is entitled to know that his confidences are rigorously maintained by his attorney and will not even be suggested or hinted at by the attorney to others." LACBA Opinion No. 403 (1982). While it may be advantageous and cost efficient for the county to use this information, "[t]he convenience of

others is not a sufficient reason for endangering confidences or causing clients to apprehend that confidences may be endangered." Id. See e.g., LACBA Opinion No. 358 (1976) (legal aid attorney may not disclose confidential financial information regarding a client's eligibility to the board of directors without the client's consent).

Even if the GR recipient is defrauding the county, disclosure is not permitted unless the acts are so serious that the benefits from their prevention outweigh the policy of preserving the client's confidentiality and secrets. See LACBA Opinion 417 (1983) (relying on Opinions 264 & 353). In Opinion No. 264, this Committee stated that client confidence is protected where the client receives monthly payments under circumstances of possible theft by false pretenses.

By bidding on or entering into the contract, the attorney may also be in danger of violating California Rules of Professional Conduct 5-102(A) and (B) which require an attorney to avoid the representation of adverse interests unless the clients provide written consent. See also ABA Rule 1.7.

Obviously, any consent by the GR recipient waiving his attorney-client or work product privileges and the attorney's ability to represent conflicting interests must be an informed and freely given consent. The RFP is silent as to the Contractor's obligation to fully inform the GR recipient of the legal ramifications of his consent. Section 6.2.1 of the RFP, p. 29, provides:

The Contractor shall explain to the client his right to alternate representation, as explained on the consent form. The Contractor shall not suggest or make any referrals to other representatives. The Contractor shall have the client sign the consent form (see Technical Exhibit 8.7). A copy shall be returned to the DPSS Control Unit with the Referral/Two Way Gram immediately after the initial interview.

Since "[m]any GR clients do not speak English and the Contractor must be prepared to interview clients who speak only a foreign language," RFP at 6, and the form is apparently only in English, it seems unlikely that an informed consent is possible. See, e.g., LACBA Opinion No. 352 (1976).

Even if an informed consent were possible, the problems inherent in serving two masters at the same time would preclude an attorney from bidding on or entering into the contract offered by the county. Since the attorney is paid by the county he must comply with the county's requirements. However, since the attorney will only get paid if his client's SSI application is approved, the attorney clearly has an interest in not having the county terminate his client's interim benefits. The attorney's independent professional judgment is thus imperiled.

Opinion No. 436 (April 15, 1985)

ATTORNEY AND CLIENT : CONFIDENTIAL INFORMATION. An attorney may not disclose confidential information that would reveal his client's unauthorized practice of law without the consent of his client.

AUTHORITIES CITED:

Calif. Business and Professions Code Section 6068(e);

Calif. Evid. Code Section 950 et seq.;
 Calif. Code of Civ. Proc. Section 2016(b) and (g);
 Calif. Rules of Prof. Conduct, Rule 3-101;
 A.B.A. Model Rules of Prof. Conduct, Rule 1.6;
 Former A.B.A. Code of Prof. Resp., DR 4-101(A);
People v. Singh, 123 Cal.App. 365 (1932);
 L.A. County Opinion Nos. 264, 274, 353, 386, 417, 422.

The Committee has received an inquiry from a law firm concerning its duty to report the apparent unauthorized practice of law being performed by a client. The law firm was involved in presenting a client in a case in which there was, among other things, a dispute on the issue of whether or not the client, who is not an attorney, had ever represented himself to be an attorney. The client has consistently under oath denied the allegations.

The law firm, while it was representing the client, found out that its client was involved in another transaction with a third party in the course of which he represented himself to be an attorney. The law firm subsequently obtained stationery which bears the name of the client and underneath it the legend "attorney at law." Additionally, a phone call to the client's office further substantiates that he is representing himself as an attorney. The law firm confronts the client with these facts. The client neither denies nor affirms them. The law firm then withdraws from the pending action.

The law firm inquires as to whether it has a duty to disclose the unauthorized practice of law.

California Business and Professions Code Section 6068(e) provides that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

The first question is whether the communication, obtained from a third party, is within the scope of the statute. There is much confusion as to the scope of an attorney's obligation under Business and Professions Code Section 6068(e), as opposed to the attorney-client privilege of Evidence Code Section 950 et seq. or the work-product doctrine (C.C.P. Section 2016(b) and (g)). The attorney-client privilege of Evid. Code Section 950 et seq. is an evidentiary privilege which pertains principally to "information between a client and his lawyer in the course of that relationship and in confidence" Evid. Code Section 952. The information obtained in the present case was obtained from a third party and through the attorney's personal investigative efforts. Thus, it most probably would not be considered subject to the "attorney-client" privilege. Additionally, to the extent the information could be considered the attorney's "work product" it is merely protected from unwarranted discovery pursuant to C.C.P. Section 2016(b).

While no California case has specifically defined the terms "confidence" and "secrets" as used in Business and Professions Code Section 6068(e) it has been the consistent position of this Committee that its coverage is far broader than the attorney-client privilege. In L.A. County Opinion No. 386, this Committee adopted the definition of the former A.B.A. Code of Professional Responsibility DR 4-101(A) which provided:

"'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested

be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client."

Moreover, the newly adopted A.B.A. Model Rules of Professional Conduct, Rule 1.6, extends this standard even further, changing "information gained in the professional relationship" to "information relating to representation of a client."

In L.A. County Opinion No. 386 this Committee considered documents and information obtained from a third party to be within the scope of Section 6068(e). Again, in L.A. County Opinion No. 417, the Committee included information obtained from third parties, an oil company and title company, to be within the scope of Section 6068(e). None of this information would have been subject to the attorney-client privileges or otherwise prohibited from disclosure.

Thus, the information in the present case, though obtained from a third party or through the attorney's private investigative efforts (and thus not privileged), is nevertheless subject to the proscription of Section 6068(e). Since the disclosure of the information in this case would clearly be embarrassing to the client and would likely be detrimental as well, the disclosure is foreclosed pursuant to Business and Professions Code Section 6068(e).

The question then posed is whether there is some countervailing policy given the particular facts of this case which would permit disclosure.

Despite the absolute language of Section 6068(e), this Committee has consistently recognized certain narrow exceptions when warranted by a strong countervailing policy.

Nevertheless, the policy against disclosure is strictly enforced and any exceptions are narrowly construed. People v. Singh, 123 Cal.App. 365 (1932). A countervailing policy raised by the inquiring law firm is that of Calif. Rules of Professional Conduct, Rule 3-101 prohibiting a member of the State Bar from aiding in the unauthorized practice of law. While this specific policy has never been previously addressed, this Committee has held that a lawyer cannot divulge client confidences to reveal violations of the State Bar Act by a member of the Bar. L.A. Opinion No. 422 (fraudulent filing of a bankruptcy petition). See also, L.A. County Opinion No. 274. Moreover, nothing in the State Bar Act or the Calif. Rules of Professional Conduct impose upon an attorney a duty to disclose violations of the Act. There does not seem to be any reason to distinguish the disclosure of the unauthorized practice of law from the disclosure of other State Bar Act violations as mentioned in Opinion No. 422. Thus, it is the opinion of this Committee that the present situation is analogous to that mentioned in Opinion No. 422 and that the threatened violation of Rule 3-101 is not sufficient to permit disclosure.

A more serious concern is posed by the threat of serious harm to the public due to the criminal fraud practiced by the client in the course of his unauthorized practice. In certain circumstances an attorney may be permitted to divulge future crimes where it "may prevent immediate and serious injury" (L.A. County Opinion No. 264). A.B.A. Model Rules, Rule 1.6(b)(1) limits such disclosure to crimes which are "likely to result in imminent

death or substantial bodily harm." While California cases have never limited disclosure solely to cases involving physical injury they have expressed similar concern with the gravity of the crime. Thus, in L.A. County Opinion No. 353 this Committee considered the disclosure of potential securities fraud to be unethical. In L.A. County Opinion No. 386 the Committee likewise considered the disclosure of ongoing perjury to be unethical conduct. See also L.A. County Opinion No. 417 (potential theft of oil revenues); L.A. County Opinion No. 422 (fraudulent filing of a bankruptcy petition and forgery).

The standard utilized in these cases is described in L.A. County Opinion No. 353:

"...information even as to an intended future crime should not be divulged unless the intended acts of the client are of a nature so serious that the benefits of their prevention outweigh the policies underlying the confidentiality principle." *Id.* at .

Unfortunately, this standard provides little guidance to lawyers in determining their responsibilities in individual cases. The victims of many economic crimes are seriously injured. Nevertheless, we have held it unethical to disclose such criminal conduct as securities fraud, theft and forgery. The lawyer debating his duties is torn between serious obligations to his client and a conflicting generalized duty to the potential future victims.

The recent debate over the proposed A.B.A. Model Rules centered largely on this identical conflict. The proposed A.B.A. Model Rule 1.6 significantly broadened the scope of the lawyer's duty to disclose confidential information including in its scope victims of purely economic crimes. That proposed rule was defeated and the present Model Rule 1.6 was adopted in the belief that strict observance of client confidentiality is essential for the lawyer-client relationship and that any exceptions should be clear and narrowly drawn.

Given the absolute standard of Section 6068(e) the argument for such a standard in California is even more compelling. The legislature has expressed a clear policy that the duty of confidentiality is paramount. Therefore, we believe it essential that we, too, adopt a standard that is narrow and clear. We believe that A.B.A. Model Rule 1.6 incorporates just such a standard. We therefore adopt it.

We realize that this is a departure from the standard expressed in prior opinions. However, we also believe it is in fact, a codification of the results of those opinions in that the preservation of confidentiality has been consistently recognized as being more important than the potential injury to victims of purely economic crimes.

Thus, we believe that disclosure of future crimes is only permitted in situations where such crimes are likely to result in imminent death or serious bodily injury. Since there is no information in this case that such a result is likely, we believe that disclosure of the client's conduct would be unethical. Thus, the firm, having assured itself that it is no longer assisting the client in his enterprise, has an obligation to maintain the secret.

Opinion No. 437 (July 2, 1985)

FEEs: DIVISION OF FEES WITH LAY PERSON. A non-lawyer client may be hired by an attorney to perform preparatory research and investigation on the client's case so long as the remuneration to be paid to client is not contingent upon or determined by the remuneration received by the attorney as his fee.

AUTHORITIES CITED:

Rule 3-102;
L.A. County Bar Opinion Nos. 156, 190, 279, 301, 327;
Informal Opinion 1972-25.

The Committee has received an inquiry concerning the ethical propriety of an attorney's hiring of a client to perform work on the client's case under the following circumstances: The attorney is prosecuting an action for consumer fraud on behalf of the client and others similarly situated. It is anticipated that if the case is successfully prosecuted there will be an award of attorney's fees. Although the client is one of the foremost authorities in the field which is the subject of the litigation he may not qualify as an expert witness for trial purposes since the subject of the litigation is not a traditional area of expertise. The attorney desires to hire an investigator and researcher to assist in preparation of the client's case and intends to advance the cost of such research and investigation against the potential attorney's fee award. The attorney desires an opinion as to the ethical propriety of retaining the client to do the investigation and research work on the case.

Rule 3-102 of the Rules of Professional Conduct prohibit a member of the state bar from directly or indirectly sharing legal fees except with a person licensed to practice law. This has consistently been interpreted to preclude an attorney from offering a percentage of any fee or recovery from a lawsuit to someone who is not a lawyer in exchange for assistance in handling the lawsuit. See, e.g., Opinions 190, 279 and Informal Opinion 1972-25. However, the Rule does make it ethically improper to retain the services of lay persons for preparatory, investigatory and research work, so long as the remuneration is not paid in a manner so as to constitute a sharing of the attorney's fee. See, e.g., Opinions 156, 301 and 327. Accordingly, so long as the client is compensated only for research and investigatory work actually performed, and in a manner which is not contingent upon or determined either by the amount of fees which may be received by the attorney or whether the attorney is compensated at all, no ethical impropriety will result from the mere hiring of the client to perform preparatory research and investigation work on his own case.

Opinion No. 438 (May 20, 1985)

A lawyer requests the Committee's Opinion on the ethical propriety of withdrawing client trust funds to pay a disputed fee. The question arises under the following circumstances.

Lawyer represented the plaintiffs in litigation that terminated in settlement before trial. Terms of the settlement required lawyer to perform services for which he sent a closing billing to the clients; they disputed the bill. Lawyer

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received the money payable under the settlement and deposited it in his client trust account. He then paid certain expenses as authorized by the clients and on their request for all remaining trust funds released to them the balance of the trust funds except the amount of his closing bill, the payment of which clients refused to approve.

At the time of distribution of funds lawyer advised clients of their right to arbitration of the fee in controversy and they then stated they were "asking the County Bar Association to arbitrate this matter." In fact, however, they did not initiate any arbitration or take any other action in the matter and lawyer has continued for three years to retain the amount of the fee in his trust account. May he now release these funds to pay his outstanding claim?

We conclude that he may not do so until his dispute with the clients has been finally resolved, and that he has an affirmative ethical obligation to seek a prompt resolution of the dispute.

An attorney's duty with respect to a client's funds is governed by California Rules of Professional Conduct, Rule 8-101. In Section (A)(2) the Rule provides that funds belonging in part to a client and in part potentially to an attorney must be deposited in the attorney's trust account and the part belonging to the attorney must be withdrawn at the earliest reasonable time after his interest in that portion becomes fixed. The Rule further states:

"However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

This Committee had occasion to consider the effect of Rule 8-101(A)(2) in our Informal Opinion 1980-3. The circumstances giving rise to the ethical problem to which that Opinion responded differed somewhat from those involved in the present inquiry. An attorney holding settlement funds in his client trust account, withdrew the amount needed to satisfy his claim for fees, acting under an oral authorization from the client. The client later repudiated the authorization, objected to the fee, and demanded delivery of the entire settlement payment. We concluded that under Rule 8-101 there is no ethical impropriety in a lawyer's withdrawal of client trust funds to pay his agreed fee when, but only when, (1) the precise amount due has been fixed by agreement, judicial determination, or in some other unequivocal manner, and (2) the attorney's right to withdraw this amount is undisputed by the client. Neither condition appears to exist in the case put by the presently inquiring attorney.

The provisions of Rule 8-101 are in effect the same as those stated in Rule 1.15 of the Model Rules of Professional Conduct of the American Bar Association which, although not mandatory in California, illustrates the general acceptance of the ethical principle expressed in our state Rule. Like its California counterpart, Rule 1.15(c) provides that if there is a dispute between a lawyer and client concerning their respective interests in property in the lawyer's possession "the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

Under Comment to Rule 1.15 it is stated that the lawyer "should suggest means for prompt resolution of the dispute, such as arbitration."

Clearly, the lawyer cannot himself unilaterally resolve the dispute as to his fee. Elementary principles of fiduciary duty preclude any self dealing or advancement of self interest with respect to the trust funds and render the lawyer as trustee incompetent to decide any questions of law such as the existence of an estoppel that would operate against the beneficiary's interest. These principles are undoubtedly the foundation of Informal Opinion 1970-1 in which this Committee stated that an attorney having a lien granted by a client on money recovered and a power of attorney from the client may not ethically enforce the lien for his unpaid fee without first bringing action to establish his right to the fee claimed.

The inquiring attorney states that the lawyer holding the trust funds in this case suggested arbitration to his client some three years ago when the dispute over his fee first arose. If, on inquiry, client still refuses to agree to payment of the lawyer's fee from the trust account and on renewal of the suggestion to arbitrate still does not act, other means of resolution of the dispute must be found.

Rule 8-101(B)(4) provides that the lawyer holding a client's funds in trust must pay them to the client promptly as requested. This in our opinion imposes an affirmative ethical obligation on the lawyer, in the absence of agreement, to seek arbitration or a judicial determination of the respective interests of his client and himself in the funds held, and to do so without delay. In view of the requirement of promptness the lawyer cannot ethically justify continued inaction and withholding of the disputed funds.

Opinion No. 439 (February 24, 1986)

ADVERSE AND CONFLICTING INTERESTS. The existence of a conflict of interest between an insured and an insurer does not preclude the independent counsel for the insured from being paid by the insurer.

AUTHORITIES CITED:

California Rules of Professional Responsibility, Rules 4-101 and 5-102;
San Diego Navy Federal Credit Union vs. Cumis,
 162 Cal.App.3d 358, 203 Cal.Rptr. 494 (1984);
 ABA Model Rules of Professional Conduct, Rule 1.8(f);
 California State Bar Committee on Professional Conduct and Responsibility, Opinion No. 1975-35.

DISCUSSION:

A firm has inquired as to the ethical propriety of its continued representation of a client given the following facts:

The law firm represents an individual in defense of a number of civil actions pending in Los Angeles Superior Court. At the time the firm began its representation of this individual it tendered the defense of these actions to the liability insurer which had insured the individual. Initially the liability insurer refused to provide representation. The liability insurer then agreed to defend the actions with a reservation of rights but refused to permit the individual to be represented by counsel of his choice, specifically the inquiring law firm. Since the inquiring law firm was already representing the individual in these actions, and the individual wished the law firm to continue with that representation, the offer was refused. The dispute between the individual and the liability insurer engendered another law-

439

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"However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

This Committee had occasion to consider the effect of Rule 8-101(A)(2) in our Informal Opinion 1980-3. The circumstances giving rise to the ethical problem to which that Opinion responded differed somewhat from those involved in the present inquiry. An attorney holding settlement funds in his client trust account, withdrew the amount needed to satisfy his claim for fees, acting under an oral authorization from the client. The client later repudiated the authorization, objected to the fee, and demanded delivery of the entire settlement payment. We concluded that under Rule 8-101 there is no ethical impropriety in a lawyer's withdrawal of client trust funds to pay his agreed fee when, but only when, (1) the precise amount due has been fixed by agreement, judicial determination, or in some other unequivocal manner, and (2) the attorney's right to withdraw this amount is undisputed by the client. Neither condition appears to exist in the case put by the presently inquiring attorney.

The provisions of Rule 8-101 are in effect the same as those stated in Rule 1.15 of the Model Rules of Professional Conduct of the American Bar Association which, although not mandatory in California, illustrates the general acceptance of the ethical principle expressed in our state Rule. Like its California counterpart, Rule 1.15(c) provides that if there is a dispute between a lawyer and client concerning their respective interests in property in the lawyer's possession "the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

Under Comment to Rule 1.15 it is stated that the lawyer "should suggest means for prompt resolution of the dispute, such as arbitration."

Clearly, the lawyer cannot himself unilaterally resolve the dispute as to his fee. Elementary principles of fiduciary duty preclude any self dealing or advancement of self interest with respect to the trust funds and render the lawyer as trustee incompetent to decide any questions of law such as the existence of an estoppel that would operate against the beneficiary's interest. These principles are undoubtedly the foundation of Informal Opinion 1970-1 in which this Committee stated that an attorney having a lien granted by a client on money recovered and a power of attorney from the client may not ethically enforce the lien for his unpaid fee without first bringing action to establish his right to the fee claimed.

The inquiring attorney states that the lawyer holding the trust funds in this case suggested arbitration to his client some three years ago when the dispute over his fee first arose. If, on inquiry, client still refuses to agree to payment of the lawyer's fee from the trust account and on renewal of the suggestion to arbitrate still does not act, other means of resolution of the dispute must be found.

Rule 8-101(B)(4) provides that the lawyer holding a client's funds in trust must pay them to the client promptly as requested. This in our opinion imposes an affirmative ethical obligation on the lawyer, in the absence of agreement, to seek arbitration or a judicial determination of the respective interests of his client and himself in the funds held, and to do so without delay. In view of the requirement of promptness the lawyer cannot ethically justify continued inaction and withholding of the disputed funds.

Opinion No. 439 (February 24, 1986)

ADVERSE AND CONFLICTING INTERESTS. The existence of a conflict of interest between an insured and an insurer does not preclude the independent counsel for the insured from being paid by the insurer.

AUTHORITIES CITED:

California Rules of Professional Responsibility,
Rules 4-101 and 5-102;
San Diego Navy Federal Credit Union vs. Cumis,
162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984);
ABA Model Rules of Professional Conduct, Rule 1.8(f);
California State Bar Committee on Professional
Conduct and Responsibility, Opinion No. 1975-35.

DISCUSSION:

A firm has inquired as to the ethical propriety of its continued representation of a client given the following facts:

The law firm represents an individual in defense of a number of civil actions pending in Los Angeles Superior Court. At the time the firm began its representation of this individual it tendered the defense of these actions to the liability insurer which had insured the individual. Initially the liability insurer refused to provide representation. The liability insurer then agreed to defend the actions with a reservation of rights but refused to permit the individual to be represented by counsel of his choice, specifically the inquiring law firm. Since the inquiring law firm was already representing the individual in these actions, and the individual wished the law firm to continue with that representation, the offer was refused. The dispute between the individual and the liability insurer engendered another law-

suit in which the individual sued the insurer for declaratory relief, bad faith, etc. The individual is also represented by the inquiring law firm in that case. In December, 1984 the decision in San Diego Navy Federal Credit Union vs. Cumis, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984) clearly established that in a situation where an insurer offered a defense but reserved its right to assert noncoverage, a conflict existed between the insurer and the insured. Thus, the insured was entitled to independent counsel paid for by the insurance company. After the Cumis decision the liability insurer recognized its obligation to provide independent counsel for the insured individual. However, it refused to pay for representation by the inquiring law firm claiming that a conflict of interest existed between it and the inquiring law firm due to the law firm's representation of the insured individual against it in the declaratory relief action. The insurer argued that the alleged conflict between itself and the inquiring law firm would preclude the inquiring law firm from being paid by the insurer to represent the individual. The law firm does not believe that any conflict exists such as would preclude it from representing the insured individual.

The two Rules of Professional Conduct which are involved in this particular case are Rules 4-101 and 5-102. Rule 4-101 prohibits an attorney from violating the confidences of his or her client. It reads:

A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

Rule 5-102(B) is also designed to protect the confidentiality of the attorney-client relationship and was promulgated to cover those situations where the attorney is actually representing an individual in continuing or pending adversary proceedings.

Rule 5-102(B):

(B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

Presumably it is the position of the insurance company that the attorney hired by the insured individual will be representing its interest as well as that of the individual insured.

Because the inquiring law firm represented the individual against the insurer a conflict exists. Therefore, the insurer reasons, the law firm cannot represent the interest of the insurer without the insurer's written consent.

Initially, it must be recognized that there exists a clear conflict of interest between the law firm and the insurer. The law firm represents the insured individual in an action against the insurer. Thus, the law firm could not represent the insured and the insurer in this matter without the written consent of all parties.

However, the insurer misapprehends the nature of the relationship between itself and the attorney for the insured. In San Diego Federal Credit Union vs. Cumis, *supra*, the court specifically found that the traditional insurance company retained law firm represented two interests, that of the insured and that of the insurer:

In the usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same.

Id. 208 Cal.Rptr. at 498.

But, the court continues, in a reservation of rights situation, a conflict is created:

"A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. In such a case, the standard practice of an insurer is to defend under a reservation of rights where the insurer promises to defend but states it may not indemnify the insured if liability is found. In this situation, there may be little commonality of interest Although issues of coverage under the policy are not actually litigated in the third party suit, this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer, who has a dual agency status." *Id.* 208 Cal.Rptr. at 498.

The Court then states that due to this inherent conflict and the duty of the lawyer not to represent conflicting interests the insured must be supplied with independent counsel.

The clear implication of San Diego Navy Federal Credit Union vs. Cumis, *supra*, is that there is no attorney-client relationship between the insured's counsel and the insurer despite the fact that the insurer is paying for the independent counsel. This is consistent with established principles. In fact, the insured's counsel owes an obligation of absolute loyalty to his client despite the payment of fees by the insurer. ABA Model Rules of Professional Conduct, Rule 1.8(f) states:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

That standard has been adopted in California in State Bar Committee on Professional Responsibility and Conduct, Opinion No. 1975-35 in which it was determined that a criminal defense lawyer could not represent a defendant whose fees were being paid for by another if there were conditions on those fees which limited the lawyers ability to fully represent his client. It is therefore clear that the mere payment of fees is not sufficient to establish an attorney client relationship.

In the present case the insured is merely paying for independent representation of the insured. No attorney client relationship is thus created. Moreover, Cumis holds that such an attorney client relationship is impossible. Therefore, not only may the inquiring law firm represent the insured despite the conflict, it must vigilantly protect against any influence occurring due to the payment of the fees.

Johnson 444

sional Conduct, ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation" Rule 8.3 addresses reporting professional misconduct. It provides, in part:

"(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

The Comment to Rule 8.3* notes that self-regulation of the legal profession requires that members of the profession initiate a disciplinary investigation when they know of an ethical violation since an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover, and that reporting is especially important where the victim is unlikely to discover the offense. However, the Comment explains that the Model Rule is tempered by practical considerations:

"If a lawyer were obligated to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

It is the view of this Committee that the underlying rationale of Model Rule 8.3 is sound, and is consistent with the public policy of this State in encouraging self-regulation of the legal profession. Likewise, while the Committee agrees with the reasoning expressed in its earlier Opinion No. 355, that reporting unethical conduct is consistent with an attorney's ethical obligations, we disagree with the conclusion that the California Rules impose an ethical duty to disclose.

There is no California Rule of Professional Conduct presently requiring an attorney to report what he or she believes to be unethical conduct, under risk that failure to report might itself lead to disciplinary action. The Committee believes that it would be inappropriate to find such a duty in the absence of any express requirement in the Rules of Professional Conduct. Accordingly, it is the view of the Committee that while there is no ethical duty to report what a lawyer believes to be unprivileged, unethical conduct on the part of another lawyer, an attorney can and should consider the seriousness of the offense and its potential impact upon the public and the profession, and may, consistent with the ethical obligations of the California Rules of Professional Responsibility, report such conduct to the appropriate disciplinary authorities for consideration.

* The Comments to the Model Rules were adopted by the House of Delegates of the ABA along with the Model Rules. The Comments do not add obligations to the rules but provide guidance for practicing in compliance with the Rules. See Preamble: A Lawyer's Responsibilities, ABA Model Rules of Professional Conduct.

Opinion No. 441 (January 26, 1987)

ATTORNEY-CLIENT: AUTHORITY OF ATTORNEY TO SETTLE LITIGATION. Attorney who cannot locate his client may not settle lawsuit filed on client's behalf, and should seek permission to withdraw.

AUTHORITIES CITED:

Rule 2-111
Bodisco v. State Bar, 58 Cal.2d 495 (1962)
Sampson v. State Bar, 12 Cal.3d 70 (1974)

A personal injury attorney represents a client with respect to an automobile accident on a contingency fee arrangement. After the filing of the lawsuit and the taking of deposition, the client disappeared, and has not been heard from in three years. All efforts, including the hiring of a private investigator, have failed in making contact with him. The defendant has elected arbitration, which will be scheduled shortly. The defendant has not been informed that the plaintiff cannot be located.

In addition, the attorney has obtained payment of \$2,000 through the Med-Pay provision of his client's automobile insurance policy, which is made out to the client. The medical bills amount to \$2,918. Under the retainer agreement, the attorney has no authority to sign and negotiate the check on behalf of the client.

The attorney asks advice as to how he may proceed in negotiating a settlement and whether he may deposit the Med-Pay check to pay in part the physician who performed the services.

An attorney may not settle litigation without obtaining the client's consent to the terms of the settlement. Sampson v. State Bar, 12 Cal.3d 70, 82 (1974); Bodisco v. State Bar, 58 Cal.2d 495, 497 (1962). Because the client has disappeared and cannot be located, the case may not be settled.

The disappearance of the client and the impossibility of locating him makes it impossible for the attorney to continue to represent him. In consequence, he should make a motion to the court to be relieved as counsel of record. Such withdrawal is authorized by Rule 2-111(C)(1)(d), which authorizes the withdrawal of an attorney where his client "renders it unreasonably difficult for the member of the State Bar to carry out his employment effectively" The disappearance of the client, and his consequent unavailability to assist in the litigation or to approve a proposed settlement, render the continued prosecution of the case unreasonably difficult, if not impossible. The motion to withdraw will inform the defendant that the plaintiff cannot be located.

It appears that under the retainer agreement the attorney has no power to do anything with a \$2,000 check except to return it to the insurer. Because the check was issued for the benefit of the physician who rendered the services, the Committee believes that it would be proper for the attorney to contact the physician and to give the physician a period of time such as thirty days to take action before returning the check to the insurer.

442

Opinion No. 442

PLAINTIFF'S EX PARTE COMMUNICATIONS WITH DEFENDANT INSURED'S INSURANCE COMPANY.

It is improper for the attorney representing a plaintiff/claimant to communicate directly with the defendant's insurer about a subject of controversy after the insurer has retained defense counsel without the express consent of such counsel.

AUTHORITIES CONSTRUED:

California Rules of Professional Conduct: Rule 7-103;
Abeles v. State Bar, 9 Cal.3d 603, 108 Cal.Rptr. 359, 510 P.2d 719 (1973);
Glacier General Assurance Co. v. Superior Court, 95 Cal.App.3d 836, 157 Cal.Rptr. 435 (1979);
 L.A.C.B.A. Formal Opinions 220, 344, 350;
 Connecticut Bar Ass'n. Informal Opinion 84-12 (1984);
 Illinois State Bar Ass'n. Committee on Professional Ethics Opinion 163 (1957);
 Kentucky Bar Ass'n Ethics Committee Opinion E-95 (1974);
 American Bar Association Model Rule of Professional Conduct 4.2;
 American Bar Association, Informal Opinion 570 (1962).

DISCUSSION

The Committee's opinion is requested as to whether an attorney representing a plaintiff/claimant may communicate directly with the insurance company that is providing a defense and coverage to an insured defendant under any of the following circumstances:

- (a) To discuss settlement and/or the insurer's failure to negotiate a settlement in good faith, without first contacting the attorney retained by the insurer to provide a defense;
- (b) To discuss settlement and/or the insurer's failure to negotiate a settlement in good faith under circumstances where defense counsel has knowledge of the prior communications and has acquiesced to those communications in the past;
- (c) To discuss settlement and/or the insurer's failure to negotiate a settlement in good faith after being instructed by the defense counsel not to communicate with the insurer;
- (d) To discuss the insured's potential liability for bad faith under circumstances where it appears that the defense counsel's conduct may be the cause of such liability.

California Rule of Professional Conduct 7-103 states in pertinent part:

A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel.

If the insurance company which has retained defense counsel is a "party" and is "represented" by defense counsel within the meaning of Rule 7-103, plaintiff's counsel is prohibited from contacting the insurer directly absent the consent of such retained defense counsel. Both American Bar Association Informal Opinion 570 (1962) and Kentucky Bar Association Ethics Committee Opinion E-905 (1974) have specifically stated that it is improper to send demand

letters directly to an insurer after retention of defense counsel unless the retained defense counsel consents to such direct contact. This committee agrees with the result for the reasons stated below.

Under prevailing California authorities, it is clear that retained defense counsel represents both the insured and the insurer. See, e.g. Lysick v. Walcom, 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1968); Glacier General Assurance Co. v. Superior Court, 95 Cal.App.3d 836, 157 Cal.Rptr. 435 (1979). The court in Lysick, specifically stated that defense counsel retained by an insurer "represents two clients, the insured and insurer." 258 Cal.App.2d at 146. Similarly, the court in Glacier General held that an insured could invoke the dual representation exception to the attorney-client privilege contained in Evidence Code Section 962 to discover communications from retained defense counsel to the insurer which had not previously been revealed to the insured. It is, therefore, clear that the insurance company is "represented" by the retained defense counsel within the meaning of Rule 7-103.

The next question is whether or not the insurer is a "party" within the meaning of Rule 7-103 when an insurer is not a named defendant in a legal action. The purpose of Rule 7-103 is to permit an attorney to function in his proper role and to prevent an attorney representing an opposing interest from impeding his performance. Abeles v. State Bar, 9 Cal.3d 603, 609, 108 Cal.Rptr. 350, 510 P.2d 719 (1973). This rationale applies whether a person is a named party in a formal legal action or simply engaged in business negotiations which do not involve adversarial proceedings.

The American Bar Association Model Rule of Professional Conduct 4.2, analogous to rule 7-103, specifically states that: "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." Similarly, the professional ethics committees of the Illinois and Connecticut bar associations have rendered opinions prohibiting attorneys from directly contacting a person on the opposing side of a business deal without the consent of the attorney representing such person in the negotiations. Illinois State Bar Association, Committee on Professional Ethics Opinion 163 (1957); Connecticut Bar Association Informal Opinion 84-12 (1984). It is, therefore, also clear that an insurer should be considered a "party" within the meaning of Rule 7-103 even though the insurer is not a named defendant.

Arguably, one of the policies underlying Rule 7-103, the protection of less sophisticated parties, is not a factor in the present inquiry. An insurer is generally sophisticated in litigation and oftentimes negotiates directly with a plaintiff/claimant's attorney before retaining defense counsel. An insurer's sophistication does not, however, create an exception to Rule 7-103 once defense counsel is retained. For instance, this committee is aware of no exception to Rule 7-103 which would allow a plaintiff's attorney in a legal malpractice action to contact an attorney defendant directly without consent of the attorney defendant's counsel. Thus, sophistication itself does not create an exception to Rule 7-103.

Finally, the purpose for which an attorney might attempt to contact an opposing party directly without consent of the opposing party's counsel does not create an exception to Rule 7-103. As previously stated by this committee:

Stating the case as strongly in favor of direct negotiation as we can, but assuming such statement only for purpose of argument, it is the position of this Committee that even if defense counsel were acting in such a manner as to violate his legal duties to the defendant, the inquiring attorney should not use that as a basis for negotiating directly with a party whom the inquiring attorney knows to be represented (however inartfully or improperly) by an attorney.

L.A.C.B.A. Opinion 350. Similarly, the California Supreme Court has stated that former Rule 12, upon which Rule 7-103 is based, "shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided." Abeles v. State Bar, 9 Cal.3d 603, 108 Cal.Rptr. 359, 510 P.2d 719 (1973). Thus, the purported purpose of informing an insurer that retained defense counsel may be subjecting the insurer to liability for bad faith is not a justification for making a contact in violation of Rule 7-103.

Based upon the foregoing, plaintiff's counsel must obtain the consent of retained defense counsel before contacting a defendant's insurer directly. There can, therefore, be no question about acquiescence in prior contacts made without consent of retained defense counsel. Such contacts should not have been made in the first place, and any future contacts should be made only after express consent of retained defense counsel.



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Based upon the foregoing, plaintiff's counsel must obtain the consent of retained defense counsel before contacting a defendant's insurer directly. There can, therefore, be no question about acquiescence in prior contacts made without consent of retained defense counsel. Such contacts should not have been made in the first place, and any future contacts should be made only after express consent of retained defense counsel.

Opinion No. 443

FINANCIAL ARRANGEMENTS WITH NON-LAWYERS: COMPENSATION PAID TO LAWYER BY DOCTOR FOR REFERRING CLIENTS FOR MEDICAL SERVICES. An attorney may not accept compensation for referring a client to a doctor who provides the client with medical services.

AUTHORITIES CITED:

California Rules of Professional Conduct, Rule 1-100;
California Rules of Professional Conduct, Rule 3-102(B);
Linnick v. State Bar, 62 Cal.2d 17, 41 Cal.Rptr. 1, 396 P.2d 33 (1964);
Business and Professions Code Section 6068(a);
Business and Professions Code Section 6106;
Health and Safety Code Section 445;
L.A.C.B.A. Formal Opinion 401.

DISCUSSION

The Committee has been asked to render an opinion concerning the following facts: Attorney A is a member of a referral service and pays a monthly fee for collective advertising. A refers cases to Doctor D on a regular basis. D pays A a monthly fee either directly or by reimbursing A's expenses in order to help promote attorney's practice and/or in exchange for A referring an unspecified number of cases each month to D. D has offered to pay A's monthly referral service fee.

The question presented to the committee is whether A may accept payment from D in the form of reimbursement for, or direct payment of, A's referral service fees.

It is the opinion of the committee that A may not accept such a payment from D. Accepting such a payment creates an unacceptable conflict of interest between A and A's clients and may constitute a criminal misdemeanor. The fact that D may make such a payment for A's benefit, rather than directly to A, does not change the result.

Rule 3-102(B) of the California Rules of Professional Conduct provides that an attorney shall not compensate another person for referring clients to the attorney. The situation described by the inquiry now before the committee is the obverse of that prohibited by Rule 3-102(B) and presents the potential of an even more direct ethical conflict.

The rationale of Rule 3-102(B) is that a person to whom a referral fee is paid "may not keep the best interests of the clients paramount when he profits from his referral. He is likely to refer claimants, not to the most competent attorney, but to the one who is compensating him." Linnick v. State Bar, 62 Cal.2d 17, 21, 41 Cal.Rptr. 1, 396 P.2d 33 (1964). The attorney who accepts compensation for referring cases to a doctor faces the same conflict of interest which Rule 3-102(B) is intended to prevent.

An attorney owes a fiduciary duty to his clients which requires him to avoid any conflict of interest. Though the factual situation described in the inquiry now before the committee is not specifically prohibited by any California rule of professional conduct, Rule 1-100 provides that "the prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned." In view of the direct conflict of interest between A and his clients which is created by accepting payments from D, the committee disapproves the acceptance of such payments.

Additionally, Health and Safety Code Section 445 makes it a misdemeanor for any person to refer patients to a physician for profit. Section 445 further provides that "the imposition of a fee or charge for any such referral or recommendation creates a presumption that the referral or recommendation is for profit." Business and Professions Code Section 6068(a) imposes the duty on every attorney to support the laws of this state. Moreover, the commission of a misdemeanor involving moral turpitude may be the basis for formal disciplinary action. Business and Professions Code Section 6106. It is, therefore, the committee's opinion that A should immediately suspend any activity which may violate Health and Safety Code Section 445.

Finally, it is the committee's opinion that payments made by D on A's behalf are the equivalent of payments made directly to A. L.A.C.B.A. Formal Opinion 401 addressed the question of whether or not the rendition of legal services at a reduced rate to an organization which refers members to an attorney constituted a prohibited referral fee. The committee's opinion was that such a discount did constitute a prohibited referral fee though no direct payment was made. The same rationale applies to the inquiry now before the committee. Whether the payment is made on A's behalf or directly to A, A profits from his referrals to D. Such a profit creates a prohibited conflict of interest and may violate Health and Safety Code Section 445.

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 443

FINANCIAL ARRANGEMENTS WITH NON-LAWYERS-
COMPENSATION PAID TO LAWYER BY DOCTOR FOR REFERRING
CLIENTS FOR MEDICAL SERVICES: An attorney may not
accept compensation for referring a client to a doctor
who provides the client with medical services.

AUTHORITIES CITED:

California Rules of Professional Conduct,
Rule 1-100
California Rules of Professional Conduct,
Rule 3-102(B)
Linnick v. State Bar, 62 Cal. 2d 17,
41 Cal. Rptr. 1, 396 P.2d 33 (1964)
Business and Professions Code Section 6068(a)
Business and Professions Code Section 6106
Health and Safety Code Section 445
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The question presented to the committee is whether A may accept payment from D in the form of reimbursement for, or direct payment of, A's referral service fees.

It is the opinion of the committee that A may not accept such a payment from D. Accepting such a payment creates an unacceptable conflict of interest between A and A's clients and may constitute a criminal misdemeanor. The fact that D may make such a payment for A's benefit, rather than directly to A, does not change the result.

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An attorney owes a fiduciary duty to his clients which requires him to avoid any conflict of interest. Though the factual situation described in the inquiry now before the committee is not specifically prohibited by any California rule of professional conduct, Rule 1-100 provides that "the prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned." In view of the direct conflict of interest between A and his clients which is created by accepting payments from D, the committee disapproves the acceptance of such payments.

Additionally, Health and Safety Code Section 445 makes it a misdemeanor for any person to refer patients to a physician for profit. Section 445 further provides that "the imposition of a fee or charge for any such referral or recommendation creates a presumption that the referral or recommendation is for profit." Business and Professions Code Section 6068(a) imposes the duty on every attorney to support the laws of this state. Moreover, the commission of a misdemeanor involving moral turpitude may be the basis for formal disciplinary action. Business and Professions Code Section 6106. It is, therefore, the committee's opinion that A should immediately suspend

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444

Opinion No. 444 (June 9, 1987)

LEGAL SERVICE ORGANIZATIONS INCLUDING NON-LAWYER SHAREHOLDERS: SHARING OF LEGAL FEES—PARTNERSHIP WITH PERSON NOT LICENSED TO PRACTICE LAW. An arrangement whereby a member of the bar participates in an incorporated entity that includes non-lawyer shareholders which is designed to render legal services and to pay the non-lawyer shareholders a return on their investment in the corporation through profits from the practice of law is not a bona fide legal service organization under Rule 2-102(A) and violates Rules 3-102 and Rule 3-103.

AUTHORITIES CONSTRUED:

Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 84 S.Ct. 1113 (1964);
Hildebrand v. State Bar of California, 36 Cal.2d 504, 225 P.2d 508 (1950);
N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963);
Utz v. State Bar of California, 21 Cal.2d 100, 108, 130 P.2d 377 (1942);
United Mine Workers v. Illinois State Bar, 389 U.S. 217, 88 S.Ct. 353 (1967);
Williams, Mires & Leech v. State Bar of California, 6 Cal.App.3d 565, 86 Cal.Rptr. 367 (1970);
 California Rule of Professional Conduct 2-102(A);
 California Rule of Professional Conduct 3-102;
 California Rule of Professional Conduct 3-103;
 Los Angeles County Bar Association Opinion No. 372;
 Los Angeles County Bar Association Opinion No. 359;
 Los Angeles County Bar Association Opinion No. 335;
 Los Angeles County Bar Association Opinion No. 327;
 Los Angeles County Bar Association Opinion No. 166.

DISCUSSION

The question presented in this Opinion is whether an attorney may, with ethical propriety, accept employment as a lawyer, and render legal services to the public through, a purported legal service organization incorporated under general California corporation law which has non-lawyer shareholders and officers. The corporation plans to use the legal fees generated by the rendition of legal services to the public to defray the expenses of the corporation and to provide a return on investment to the non-lawyer shareholders of the corporation out of remaining profits. The Committee is of the view that such an arrangement would not constitute a "bona fide" legal service organization under Rule 2-102(A) of the California Rules of Professional Conduct and would violate Rules 3-102 and 3-103 of the California Rules of Professional Conduct. A member of the State Bar could not ethically be employed by such an entity.

Rule 2-102(A) of the California Rules of Professional Conduct provides that the participation of a member of the bar in a bona fide organization that furnishes, recommends, or pays for legal services, is not, of itself, a violation of the rules. However, Rule 2-102(A) requires that the legal service organization be "bona fide." A legal service organization is not "bona fide" for purposes of Rule 2-102(A) if it (1) "allows any third person, organization or group to interfere with or control the performance of the member's duties to his or her clients"; (2) "allows unlicensed persons to practice law"; or (3) "allows any third

person, organization or group to receive directly or indirectly any part of the consideration paid to the member of the State Bar" except as otherwise permitted by the Rules of Professional Conduct.

The arrangement described above appears to violate all three standards for determining whether a legal service organization is bona fide. For the same reasons that the entity would not qualify as a bona fide legal service organization under Rule 2-102(A), the Committee is of the view that a lawyer would violate the Rules of Professional Conduct by accepting employment from such an entity.

First, the proposed arrangement raises the possibility that control over the rendering of legal services will be placed in the hands of non-lawyers whose primary interest is profits rather than the provision of competent legal services. Such arrangements have been condemned on numerous grounds in this state. See e.g., Utz v. State Bar of California, 21 Cal.2d 100, 108, 130 P.2d 377 (1942).

In other, yet similar situations, we have found arrangements which inject an element of non-lawyer control into the relationship between lawyer and client to violate applicable ethical principles. Thus, in Los Angeles County Bar Association Opinion No. 327 (July 27, 1972), the Committee stated that a lawyer should not accept employment by a legal research company owned by law persons for the purpose of rendering legal services to its clients. In Los Angeles County Bar Association Opinion No. 359 (July 21, 1976), the Committee reached the same conclusion in the context of a lawyer wishing to render professional services through a personnel leasing company. See also Hildebrand v. State Bar of California, 36 Cal.2d 504, 225 P.2d 508 (1950) (holding, under former Rules, that lawyer may not accept employment from any association that for compensation controls or influences such employment); Los Angeles County Bar Association Opinion No. 335 (April 19, 1973) (arrangement under which a lawyer and doctor proposed to form a corporation for the purpose of aiding other attorneys in their prosecution of malpractice litigation was unethical).

Here, the lawyer is accountable to the corporation and its non-lawyer shareholders and officers for the profitability of the legal services performed for the lawyer's clients. The shareholders have invested in the corporation with the expectation that they will receive a return on their investment out of the profits generated by the lawyer's performance of legal services. Such expectations could very well lead to conflicts between the corporation, the lawyer and the clients. In our view, Rule 2-102(A) would prohibit such an arrangement because of the likelihood that the interests of the corporation and its shareholders would interfere with or control the performance of the lawyer's duties to his or her clients.

Second, the proposed arrangement may violate the requirement of Rule 2-102(A) that the legal service organization not permit unlicensed persons to practice law. The Committee does not determine questions of law, and what constitutes the practice of law is a legal question. See Los Angeles County Bar Association Opinion No. 166. The inquiry assumes, however, that the practice of law is conducted through a non-lawyer corporation with non-lawyer shareholders as financial beneficiaries of the lawyer's employment. Assuming, without deciding, that the corporation (and, perhaps, its officers and shareholders) would be engaged in the practice of law, such an arrange-

ment would not be bona fide under Rule 2-102(A). Moreover, the lawyer involved would improperly be aiding the unlicensed practice of law in violation of Rule 3-103 of the Rules of Professional Conduct. See Opinion No. 372 (February 21, 1978) (the prohibition of Rule 3-103 presumably applies to business arrangements other than partnerships).

Finally, the proposed arrangement is also in conflict with the requirement of Rule 2-102(A) that the legal service organization not engage in fee-splitting with non-lawyers. Rule 2-102(A) permits the sharing of legal fees only as otherwise permitted by the Rules of Professional Conduct. Rule 3-102 of the Rules of Professional Conduct prohibits the sharing, directly or indirectly, of legal fees with a person not licensed to practice law except in limited situations. None of the exceptions to Rule 3-102 is applicable to this situation.

This Committee has previously expressed concern with fee-splitting arrangements that increase the cost of legal services to the public. See, e.g., Los Angeles County Bar Association Opinion No. 372 (February 21, 1978); Los Angeles County Bar Association Opinion No. 359 (March 11, 1976); Los Angeles County Bar Association Opinion No. 327 (July 27, 1972). The present arrangement may require the lawyer to increase his or her fees in order to generate a return on investment deemed acceptable by the non-lawyer shareholders of the corporation. Thus, the indirect splitting of legal fees, accomplished through the payment to non-lawyer shareholders of corporate dividends derived from legal services, could violate Rule 3-102 and disqualify the proposed arrangement as a legal service organization under Rule 2-102(A).

In reaching its conclusion, this Committee is not suggesting that any other group legal service organizations, legal aid associations or lawyer referral programs do not meet the requirements of Rule 2-102(A) or violate the relevant Rules of Professional Conduct. To the contrary, various types of group legal service and referral organizations have been encouraged by this Committee and the courts, particularly where the organization seeks fulfillment of public and professional objectives, does not seek an individual profit, and has a legitimate, non-profit interest in making legal services more readily available to the public.* In our view, however, the arrangement under consideration here is strictly for profit, and the potential harms flowing from law interference with the attorney-client relationship, fee splitting, and the unauthorized practice of law, are not outweighed in this case by the compelling and countervailing public policy considerations favoring other forms of legal service organizations.

* See, e.g., N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) (upholding the right of lay organizations to refer members to selected or recommended attorneys); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 84 S.Ct. 1113 (1964) (same); United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217, 88 S.Ct. 353 (1967) (same); Emmons, Williams, Mires & Leech v. State Bar of California, 6 Cal.App.3d 565, 86 Cal.Rptr. 367 (1970) (county bar association lawyer reference program).

Opinion No. 445 (September 28, 1987)

ATTORNEYS FEES: SETTLEMENTS RESTRICTING THE FUTURE PRACTICE OF LAW—SUPPORT FOR THE LAW AND RESPECT FOR THE LEGAL SYSTEM. Both the United States and California have "fee shifting" statutes which provide that the Court may award attorney's fees to plaintiff's counsel where the plaintiff's action has conferred a significant public benefit. (E.g., 42 U.S.C. §1988; C.C.P. §1021.5.) Frequently, plaintiff's counsel is an attorney with a "public interest" firm or organization dependent in large part on public funding and the receipt of court awarded fees. Also, frequently the plaintiff is indigent and the action commenced on his or her behalf seeks injunctive relief rather than damages. It is not an unusual occurrence for defense counsel in these actions to offer a settlement on the condition that plaintiff's counsel waive his or her right to court awarded fees. Such offers place plaintiff's counsel in a difficult dilemma: accepting the offer is clearly in the interest of the client and, at least with respect to the issue sub judice, the public; however, waiver of court awarded fees will likely result in no compensation being received in respect of the pending matter and, if a practice of such waiver demands becomes prevalent, the economic viability of future public interest litigation is jeopardized. We have been asked whether it is ethically permissible for defense counsel to condition a settlement proposal on plaintiff's counsel's agreement to waive court awarded fees.

AUTHORITIES CONSTRUED:

Evans v. Jeff D., U.S., 106 S.Ct. 1531 (1986)
Riverside v. Rivera, U.S., 106 S.Ct. 2686 (1986)
Serrano v. Unruh, 32 Cal.3d 621, 639 n.29 (1982)
 42 U.S.C. Section 1988
 California Business and Professions Code §6068(a)
 California Business and Professions Code §6068(b)
 California Business and Professions Code §6068(h)
 California Code of Civil Procedure Section 1021.5
 California Rules of Professional Conduct, Rule 2-109
 Committee on Legal Ethics of the District of Columbia Bar Association Opinion No. 147 (1/2/85)
 American Bar Association DR 1-102(A)(5)
 American Bar Association DR 2-106
 American Bar Association DR 2-108(3)
 American Bar Association DR 2-108(B)
 American Bar Association DR 2-110
 American Bar Association DR 1-182(A)(5)
 American Bar Association DR 5-101(A)
 American Bar Association EC 7-7
 American Bar Association EC 7-8
 American Bar Association EC 7014
 American Bar Association EC 2-25
 American Bar Association Model Rules of Prof. Conduct 8.4(d)
 Georgia State Bar Opinion No. 39 (7-20-84)
 Board of Maine Grievance Commission of the Board of Overseers Opinion No. 17 (1-15-81)
 Michigan Bar Association Opinion C-235 (5-85)
 State Bar of New Mexico Advisory Committee Opinion 1985-3

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New York City Bar Association on Professional Ethics
Opinion No. 80-94 (1981)
New York City Bar Association on Professional Ethics
Opinion No. 82-80
Vermont Bar Association Opinion 85-3 (1985)

DISCUSSION

We have been asked whether it is ethically permissible for defense counsel to condition a settlement proposal on plaintiff's counsel's agreement to waive court awarded fees. It is the opinion of this committee that, in the context of civil rights and civil liberties cases it is not ethically permissible for defense counsel to condition a settlement proposal on plaintiff's counsel's agreement to waive all right to court awarded fees. We recognize that there is no California Rule of Professional Conduct specifically dealing with the issue presented. However Rule 1-100 states: "The prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned."

Our analysis begins with a review of the relevant decisions. In *Evans v. Jeff D.*, , U.S. , 106 S.Ct. 1531 (1986), the Supreme Court held that the District Court did not have a duty to reject a proposed settlement because the settlement included a waiver of statutorily authorized attorney's fees. The Court acknowledged the dilemma created by settlements conditioned upon fee waivers but determined that, given the absence of a statutory prohibition on the practice and given, in the Court's view, the overriding public policy in favor of settlement, the practice was not prohibited. A three justice dissent found that the public policy in favor of providing adequate legal representation for those wronged by the type of conduct to which fee shifting statutes were addressed was the overriding policy and that the practice should be prohibited.* The dissent also stressed that the majority did not address the applicability of local ethical restrictions on the practice and invited state and local bar associations to regulate the practice.

Numerous state and local bar associations have also addressed the issues. In Opinion No. 17 (1-15-81), the Grievance Commission of the Board of Overseers of the Board of Maine held that in a class action where plaintiff's counsel is statutorily entitled to be compensated by defendant, the "inherent conflict of interest ... requires a plaintiff's attorney to abstain from any fee discussion with a defendant until after the underlying case has been at least tentatively resolved." However, the opinion further states that "[i]n no event may plaintiff's counsel prevent his client from settling a case, even though such a settlement may ignore the plaintiff's right to [statutory fees]." The opinion states that none of the provisions of the ABA Code of Professional Responsibility are directly applicable and relies on analogous class action cases which criticize simultaneous negotiation of the merits of settlement and of attorneys fees for support for its conclusion.

In Opinion No. 80-94 (1981), the New York City Bar Association on Professional Ethics addressed the question whether it was ethical for defense counsel in actions to which fee shifting statutes were applicable to make settlement offers which are contingent upon fee waivers. A majority of the Committee concluded that such conduct was unethical and grounded its interpretation on the interplay of three concepts. The majority felt:

1. That the purpose of the statutes -- to make counsel

available to those who cannot afford them -- reflected the overriding policy. This basis of the opinion has now been nullified by *Jeff D.* at least insofar as federal litigation is concerned. It is unclear whether California would follow *Jeff D.* The California Supreme Court has stated that "it is not our view that federal authority is of more than analogous precedential value in construing §1021.5 ... We envision an independent state rule." *Serrano v. Unruh*, 32 Cal.3d 621, 639 n.29 (1982).

2. That the long-term effect of the practice would reduce availability of public interest counsel to indigents, which reduction would prejudice a vital aspect of the administration of justice and thereby give rise to a violation of ABA DR 1-102(A)(5) which provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

3. That the practice is analogous to the prohibition of ABA DR 2-108(B) prohibiting a lawyer from requiring, as a condition of settlement, that opposing counsel agree not to thereafter represent similarly situated plaintiffs and, by analogy, is ethically prohibited.

In Opinion No. 39 (7-20-84), the Georgia State Bar declined to follow the reasoning of New York City Opinions 80-94 and 82-80 and determined that it is not unethical for defense counsel to offer a lump sum settlement which could result in a full or partial fee waiver. The opinion stresses the desirability of settlements and the defendant's need to know their total exposure - both for liability and for fees.

In Opinion No. 147 (1/2/85), the Committee on Legal Ethics of the District of Columbia Bar Association concluded that a defense attorney in an action in which statutory attorney's fees are provided may not ethically condition a settlement offer on a waiver or limitation of fees but may ethically offer a single lump-sum settlement. The Committee stressed that the purpose of the fee statute is to provide counsel for those who could not otherwise afford counsel in order to advance the administration of justice and concluded that a settlement offer conditioned upon a fee waiver would violate DR ABA 102(A)(5) (conduct prejudicial to the administration of justice). The Committee also noted that defense counsel in the subject situations are usually government counsel, who have a duty to deal fairly (ABA EC 7014). Further, the Committee found support in ABA EC 2-25 (lawyers should support efforts to make counsel available to those who cannot afford it) and, by analogy, ABA DR 2-108(3) (avoiding settlement agreements which restrict the right to practice law).

In Opinion C-235 (5-85), the Michigan Bar Association reviewed the applicable court and ethics opinions and concluded that they provided uncertain guidance on the issue whether in a case to which a fee shifting statute was applicable a plaintiff's lawyer may simultaneously negotiate a settlement on the merits and a resolution of attorney's fees. Declining to base its opinion on public policy or statutory interpretation because it felt that it was incompetent to do so, the Committee grounded its conclusion that such conduct was permissible on the fundamental ethical principle that the lawyer's duty is to the client, not to the "public interest." With that guiding principle in mind the Committee suggested that a lawyer could engage in simultaneous negotiation if he or she complied

with ABA DR 5-101(A) (disclosure of potential conflict and receipt of client consent), and ABA EC 7-7 and ABA EC 7-8 (informing client of settlement offers and all relevant considerations relating thereto). The Committee also suggested that counsel should seek assistance and/or protection from the court and, where "actual conflict" is unavoidable, withdraw pursuant to ABA DR 2-110. Finally, the Committee opined that adequate disclosure to the client of the potential conflict of interest "must start with the retainer agreement" wherein counsel should specify how the issue of awardable fees will be handled as between lawyer and client and as between client and the opposing party.

In Opinion 1985-3, the State Bar of New Mexico Advisory Committee concluded that because its facts involved an attorney in private practice (as opposed to "public interest" practice) and the relief sought was limited to damages, it was not unethical for defendant's counsel to offer or plaintiff's counsel to accept (with his or her client's approval) a lump sum settlement provided counsel did not violate ABA DR 2-106 (excessive fees).

In Opinion 85-3 (1985), the Vermont Bar Association opined that it would be ethical for a plaintiff's attorney who has entered into a settlement agreement which provided, *inter alia*, for a waiver of statutory fees to breach the agreement and seek court awarded fees. The reasoning of the opinion is that because it "would seem reasonable to conclude that it would be inappropriate to allow the function of [fee shifting statutes] to be negated through settlement negotiations," and because a court would have to approve the breach and the fee, the conduct is ethical.

While these decisions seem somewhat disparate, there are certain consistent positions. All focus specifically on fee shifting statutes in the area of civil rights and civil liberties. Additionally, virtually all that consider the question bar as unethical a settlement demand which includes a complete waiver of attorney's fees. We believe that these two consistent positions adhered to by the bars of our sister states and local jurisdictions reflect the ethical norms of California as well. It is our opinion, therefore, that it is also unethical in California in civil rights and civil liberties cases for a defense counsel to condition a settlement demand upon a complete waiver of plaintiff's right to any court awarded fees.

California Business and Professions Code §§6068(a) and (b) require California attorneys to support the law and respect the legal system. Additionally, Business and Professions Code §6068(h) provides that it is the duty of an attorney "never to reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed." We believe that these provisions are analogous to former ABA DR 1-102(A)(5), now ABA Model Rules of Prof. Conduct 8.4(d), and taken together require an attorney to refrain from conduct prejudicial to the administration of justice.

Additionally, we believe that offers of settlement by defense counsel in civil rights and civil liberties cases which are conditioned upon a complete waiver of the plaintiff's right to attorney's fees seriously undermine those ethical principles. As stated by the District of Columbia Bar, Committee on Legal Ethics, Opinion No. 147:

"Authorization of fee awards under such statutes is critical to the administration of justice; indeed, it ap-

pears critical to the perception of justice and its accessibility to all members of society. In the civil rights and civil liberties areas, the statutory fee award is a concrete recognition that the protections of minorities against invidious discrimination or abuse by arbitrary governmental action are often meaningless unless counsel can be secured to assist in the enforcement of those rights, and that, typically, victims of such conduct are unable to afford counsel. Offers of settlement that are conditioned on plaintiff's counsel waiving such statutory fees could seriously undermine the effectiveness of these provisions as a device for making counsel available to persons having claims under these statutes."

Id. at A36.

California has, in Business and Professions Code Section 6068(h), explicitly recognized the duty of each attorney to participate in maintaining some minimal level of access for the disadvantaged and oppressed. It would be incongruous if that promise of access, supported by the policies of the civil rights' attorneys' fee statutes, was permitted to be rendered ineffectual through such practices as defendants routinely requiring the waiver of all rights to attorneys fees. Should defense counsel be permitted to condition settlement offers in this manner, the effect would certainly be to drastically curtail that access by making it economically impossible for plaintiff's attorneys to continue their practice. As stated by Justice Brennan in his dissent in *Evans*, *supra*:

"And, of course, once fee waivers are permitted defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss not to demand that the plaintiff waive statutory attorneys fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client. Because waiver of fees does not affect the plaintiff, a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived. Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees."

Id. at 106 S.Ct. at 1553.

The impact of this practice will therefore be to effectively eliminate future access to the courts in civil rights and civil liberties cases by eliminating the practice of those lawyers willing to take such cases based on the possibility of future court awarded fees.

A similar basis for this decision is the policy embodied in California Rules of Professional Conduct, Rule 2-109 which states:

"(A) A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law...."

Should defendants be permitted to condition settlement upon a waiver of fees, the effect will be to eliminate the practice of those lawyers who are currently willing to take such cases. The effect could be as dramatic and as

complete as if the defendant had extracted an agreement explicitly restricting their future practice of law.

For this reason, it is the opinion of this Committee that it is not ethically proper for a defense attorney to condition a settlement offer in a civil liberties or civil rights case on a complete waiver of the plaintiff's attorney's right to compensation under applicable fee shifting statutes.

This Committee is not unmindful of the strong judicial policy in favor of settlement. Acknowledging that policy and the complexities it introduces, we limit this opinion solely to a consideration of conditioning settlement offers in civil rights and civil liberties cases on a waiver by the plaintiff of all right to attorney's fees. We make no comment on the ethical propriety of settlements conditioned upon acceptance of partial waiver of fees or offers of lump sum settlements or the simultaneous negotiation of settlement on the merits and settlement of fees. We also make no comment on attorney's fees demands in other types of class action or in other civil litigation where attorney's fees may be available.

* Two months later in Riverside v. Rivera, U.S., 106 S.Ct. 2686 (1986), a four justice panel, joined by a fifth in the conclusion only, stressed that the public policy which underlies fee shifting statutes favors the provision of adequate legal representation to persons wronged by the type of conduct which the fee shifting statutes addressed. However, the Court was not dealing with a settlement and the Court's public policy discussion does not contrast the legal representation policy with the policy in favor of settlements.

446

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Opinion No. 446 (December 7, 1987)

DUAL OCCUPATION. A lawyer may incorporate and become a sole shareholder of a company that will publish and market books written by the lawyer if the lawyer complies with the Rules of Professional Conduct, specifically including Rules 2-101 and 3-102.

DUAL OCCUPATION AND SOLICITATION. A lawyer may not incorporate and become the sole shareholder of a management consulting company that would act as the lawyer's agent in the solicitation of business.

AUTHORITIES CITED:

- Ohralik v. Ohio State Bar Association*,
436 U.S. 447 (1978)
- In re Arnoff*, 22 Cal.3d 740, 746, Supp.150, Cal.Rptr. 479 (1978)
- California Business and Professions Code
Sections 6150-6154
- Rules of Professional Conduct Nos. 2-101, 3-102
Standards Adopted by Board of Governors
under Rule 2-101(D)
- Los Angeles County Bar Opinion No. 307
(November 8, 1968)
- Los Angeles County Bar Opinion No. 384 (April 8, 1980)
- Los Angeles County Bar Opinion No. 404
(January 19, 1983) (revised)
- Los Angeles County Bar Opinion No. 413
(August 17, 1983).

A lawyer who is the sole shareholder of a law firm seeks this Committee's guidance as to whether he may incor-

porate and become the sole shareholder of (1) a book publishing company to publish and market books on business management topics, including a book written by the lawyer on estate planning and business law and (2) a management consulting firm directed exclusively to companies in the "start-ups and acquisition" phases.

With regard to the book publishing company, the lawyer wishes to use "direct mail, direct response advertising and established book distribution channels" to market the book. The book will illustrate certain planning issues by citing "stories" drawn from the lawyer's personal experience. The book will also contain a biographical sketch describing the lawyer as experienced in business and estate law.

With regard to the management consulting firm, the lawyer proposes that a "non-lawyer CEO-salesman" or a "lawyer CEO-salesman" would (a) contact persons responding to direct mail and display ads and (b) sell "market research and business plan development services" provided by independent consultants on a sub-contract basis. The lawyer intends that consulting customers who lack current legal representation will be introduced to the lawyer by the "CEO-salesman" and that the lawyer will be engaged to provide legal services.

With respect to both the publishing and management consulting ventures, the lawyer has inquired:

- "1. Is there any ethical prohibition to conducting the proposed ventures in the manner described?
- "2. Considering that virtually no customer contact will take place at its principal place of business, may either or both ventures be conducted from the law firm premises?
- "3. Should the common ownership of the law firm and affiliated business be disclosed to customers of those affiliates? If so, when? In the solicitation material? In the points-of-sale material? In the first direct contact? At the point at which a referral is made to the law firm?"

These questions raise important issues regarding the terms upon which lawyers may engage in two professions from the same office and the extent of permissible advertising and solicitation for the dual professions. We will separately analyze each of the businesses.

Publishing Business

This Committee has previously decided that a lawyer may ethically engage in two professions and may practice both professions from the same office as long as the Rules of Professional Conduct ("Rules") are followed. (Opinion Nos. 384 and 413.) Therefore, the attorney may own a book publishing company that operates from the same premises as his law office.

This Committee has also previously decided that an attorney may permit (1) his name to appear as author of a pamphlet on a legal subject and as author thereof in the publisher's advertising material and (2) reference to his profession in the pamphlet and in such advertising material. (Opinion No. 307; November 8, 1968.)

Because the subject corporation is wholly owned by the lawyer, and the book will be advertised and will contain statements that may be considered to be communications or solicitations within the meaning of the Rules, the Rules apply to all such advertising and statements, including biographical, in the book. Therefore, all statements made

in the advertising material and the book must comply with the Rules, specifically including Rule 2-101 (Professional Employment), the standards adopted by the Board of Governors under Rule 2-101(D), and Rule 3-102 (Financial Arrangements With Non-Lawyers).

If the Rules are satisfied, the separate publication and law businesses may be conducted from the same premises. The common ownership of the publishing company and the law firm should be disclosed in the material advertising the book and in the book itself.

Management Consulting Firm

For the reasons explained in the previous section, in general, a lawyer may ethically engage in two professions and may, therefore, practice both as a lawyer and owner of a management consulting business from the same office as long as the Rules are followed. The significant question posed by the lawyer is whether the management consulting firm as proposed can employ a salesman who, as part of the purpose of the management consulting firm, would introduce potential clients to the lawyer.

This Committee has in the past extensively reviewed and analyzed issues of permissible advertising and solicitation by attorneys (Opinion No. 404) and issues raised in the context of advertising and solicitation performed by or for an attorney owning and operating dual businesses (Opinion Nos. 384 and 413). The reasoning and conclusions of those Opinions, Rule 2-101 and the Business and Professions Code compel the conclusion that the portion of the management consulting business that would introduce potential clients to the lawyer by the means proposed would violate Rule 2-101(B) and (C).

Rule 2-101(B) provides that:

"No solicitation or communication seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or communication specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

"Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present client, or a member's right to respond to inquiries from potential clients."

Under this Rule, neither a lawyer nor his agent in person or by telephone can specifically direct a "communication" or "solicitation" to a "particular potential client regarding that potential client's particular case or matter and seeking professional employment" be delivered by any other means unless that solicitation or communication is constitutionally protected.

By the terms of Rule 2-101(B) itself, therefore, the proposed conduct is prohibited because it is specifically

directed to a particular potential client regarding that potential client's particular case or matter and seeks professional employment for pecuniary gain for the lawyer. The proposed conduct does not constitute a response to inquiries from a potential client. If the CEO-salesman orally initiates inquiry as to the need for legal services, such inquiry may be in person solicitation in violation of Rule 2-101(B).

The conduct also violates both Rule 2-101(C) and Business and Professions Code Sections 6150-6154 that prohibit the acceptance of professional employment obtained through the acts of an agent, runner or capper, which acts would be in violation of the law.

Rule 2-101(C) provides that:

"A member or a member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the state bar, would be in violation of subdivisions (a) or (b) of this Rule 2-101."

Business and Professions Code Section 6151(a) defines a runner or capper as "any person, firm, association or corporation acting in any manner or in any capacity as agent for an attorney at law ... in the solicitation or procurement of business for such attorney as provided in this article." An "agent" is defined in Section 6151(b) as "...one who represents another in dealings with one or more third persons."

Further, prior Opinions of this Committee have made clear that (1) a person who came to an attorney-real estate broker seeking services solely as a real estate broker could not then be solicited in any manner to engage the legal services of the attorney in the transaction involved without violating Rule 2-101(B); (Opinion Nos. 384 and 413. ("...the lawyer should insure that legal services are not provided to clients personally solicited by the broker-employees.") and (2) if a client came to a realty company owned by a lawyer seeking brokerage services only, the brokerage company could not solicit the client in any manner regarding legal services in connection with the real estate transaction unless that solicitation is constitutionally protected (Opinion No. 413, citing Opinion No. 404). The Committee views a management consulting company's rendering of business advice as analogous to a real estate brokerage business for the purpose of application of the Rules.

By its terms, Rule 2-101(C) refers back to Rule 2-101(B) and thus incorporates the reference in 2-101(B) to constitutionally protected speech. This Committee has already noted its opinion that this Rule 2-101(B) is "very unsatisfactory, because it gives no guidance as to what kinds of otherwise prohibited conduct are constitutionally protected." (Opinion No. 404.)

However, the set of facts posed—i.e., a person employed by a corporation, solely owned by the lawyer, soliciting business for that lawyer—does not pose a difficult constitutional question in our view. The Business and Professions Code's restrictions on a lawyer's agent's solicitation of business for that lawyer have been ruled constitutional. In *re Arnoff*, 22 Cal.3d 740, 746 Supp.150, Cal.Rptr. 479 (1978). See also, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

In view of the Committee's conclusion that the management consulting firm cannot be operated in any respect if its purpose is to recommend clients to the lawyer, it follows that an operation as described cannot be conducted at all, much less on the premises of the law firm.

Opinion No. 447

FEE SPLITTING WITH A NON-LAWYER. An attorney may remit to a private individual client the difference between an amount calculated by the original contingency fee agreement and a subsequent larger amount of attorneys fees awarded by the court provided the lawsuit is brought in good faith and the proposed new fee is not contemplated until after the court has awarded attorneys fees.

AUTHORITIES CITED:

Rule 3-102(A);
ABA Model Code DR 3-102;
ABA Model Rule 5.4(a);
LACBA Opinions 68, 102, 226, 261;
Emmons, Williams, Mire & Leech v. State Bar,
6 Cal.App.3d 565, 86 Cal.Rptr. 367;
Vella v. Huggins, 151 Cal.App.3d 515, 198 Cal.Rptr. 725;
Camacho v. Schaeffer, 193 Cal.App.3d 718;
Wilderness Society v. Morton, 495 F.2d 1026,
(D.C. Circuit 1974);
National Treasury Employees Union v. United States
Department of Treasury, 656 F.2d 848
(D.C. Circuit 1981);
Devine v. National Treasury Employees Union,
805 F.2d 383 (1986);
Carran v. Department of Treasury, 805 F.2d 1406
(9th Circuit 1986).

Attorney entered into a fee agreement with Client which at the time only contemplated a contingency fee of 40% of the recovery. Attorney, on behalf of Client, sued Defendant under a statute which provides for an award of reasonable attorneys fees. Client/Plaintiff prevailed at trial and the court awarded Client/Plaintiff attorneys fees which exceeded the 40% amount specified by the contingency fee agreement. After a court award of fees a different fee arrangement is contemplated between Attorney and Client. Attorney inquires:

1. May Attorney remit to the Client the difference between the amount of fees awarded by the court and the 40% calculated under the fee agreement? Attorneys fees would then be limited to the lesser amount of the 40% of recovery calculated under the fee agreement.

2. Assume a different situation where attorneys fees are awarded under an "Attorney Fees Provision" in a contract between Client/Plaintiff and Defendant rather than pursuant to statute. May Attorney remit to Client the amount of fees awarded which are in excess of the amount specified in the fee agreement between Client and Attorney?

Both inquiries are limited by the following circumstances:

First, the lawsuit is brought on behalf of a single private individual litigant, Client, who alone is responsible for attorneys fees. This opinion does not address lawsuits brought by or on behalf of organizations for their member-

ship or by charitable or other public interest organizations for public benefit. (See Wilderness Society v. Morton, 495 F.2d 1026, (D.C. Circuit 1974); National Treasury Employees Union v. United States Department of Treasury, 656 F.2d 848 (D.C. Circuit 1981); Devine v. National Treasury Employees Union, 805 F.2d 384 (1986); Carran v. Department of Treasury, 805 F.2d 1406 (9th Circuit 1986).)

Second, the action is brought by Attorney and Client in good faith and not for the purpose of generating attorneys fees. It would be improper to commence or prosecute a lawsuit which contemplates as its sole purpose the generation of legal fees. (See California Rules of Professional Conduct Rules 2-110(A) and (B) and 2-111(B)(1).)

Third, it is not contemplated, until after award of court ordered attorneys fees, that fees should be other than those specified by the contingent fee agreement. If under the circumstances as discussed herein, prior to award of fees, Attorney and Client have agreed that court awarded attorneys fees will be remitted in part to the Client, then Attorney should inform the court of that fact prior to its award of any attorneys fees. (See Business and Professions Code Section 6068(d); Rule 7-105; LACBA Opinions 226, 261.)

Since this Committee is of the opinion that under the specific limitations stated above the Attorney may remit to Client the amount awarded in excess of the amounts calculated in the fee agreements, both inquiries are discussed together.

Rule 3-102(A) provides in pertinent part that "A member of the State Bar or the member's firm shall not directly or indirectly share legal fees except with a person licensed to practice law...."

The American Bar Association has similar rules proscribing the division of legal fees with non-lawyers. (See ABA Model Code DR 3-102, ABA Model Rule 5.4(a).) The comment to ABA Rule 5.4(a) provides that the limitation on fee splitting is designed to protect the lawyer's professional independence of judgment. Former ABA Ethical Consideration E-8 states that since a lawyer should not aid or encourage a lay person to practice law, the Attorney should not practice law in association with the lay person or otherwise share legal fees with the non-licensed individual. California appellate cases set out the several concerns of fee-splitting between lawyers and lay persons: "the danger of competitive solicitation (Crawford v. State Bar, 54 Cal.2d 659, 666 [7 Cal.Rptr. 746, 355 P.2d 490]); [such fee-splitting] poses the possibility of control by the lay person interested in his own profit rather than the client's fate (Utz v. State Bar, 21 Cal.2d 100, 108 [130 P.2d 277]); [and such fee-splitting] facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney (Linnick v. State Bar, 62 Cal.2d 17, 21 [41 Cal.Rptr. 1, 396 P.2d 33]; Hindebrand v. State Bar, 36 Cal.2d 504, 523 [225 P.2d 508], separate opinion of Traynor, J.)" (Emmons, Williams, Mires & Leech v. State Bar, 6 Cal.App.3d 565, 573-574, 86 Cal.Rptr. 367.)

None of the above stated ethical concerns of fee-splitting with lay persons are relevant if the lay person is a client who has employed the Attorney under a prior specified contingency fee agreement and the limited circumstances set forth in this opinion are applicable since the client is not encouraged to practice law, attorney's professional in-

447

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Opinion No. 447

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(D.C. Circuit 1974);
National Treasury Employees Union v. United States
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1. May Attorney remit to the Client the difference between the amount of fees awarded by the court and the 40% calculated under the fee agreement? Attorneys fees would then be limited to the lesser amount of the 40% of recovery calculated under the fee agreement.

2. Assume a different situation where attorneys fees are awarded under an "Attorney Fees Provision" in a contract between Client/Plaintiff and Defendant rather than pursuant to statute. May Attorney remit to Client the amount of fees awarded which are in excess of the amount specified in the fee agreement between Client and Attorney?

Both inquiries are limited by the following circumstances:

First, the lawsuit is brought on behalf of a single private individual litigant, Client, who alone is responsible for attorneys fees. This opinion does not address lawsuits brought by or on behalf of organizations for their member-

ship or by charitable or other public interest organizations for public benefit. (See Wilderness Society v. Morton, 495 F.2d 1026, (D.C. Circuit 1974); National Treasury Employees Union v. United States Department of Treasury, 656 F.2d 848 (D.C. Circuit 1981); Devine v. National Treasury Employees Union, 805 F.2d 384 (1986); Carran v. Department of Treasury, 805 F.2d 1406 (9th Circuit 1986).)

Second, the action is brought by Attorney and Client in good faith and not for the purpose of generating attorneys fees. It would be improper to commence or prosecute a lawsuit which contemplates as its sole purpose the generation of legal fees. (See California Rules of Professional Conduct Rules 2-110(A) and (B) and 2-111(B)(1).)

Third, it is not contemplated, until after award of court ordered attorneys fees, that fees should be other than those specified by the contingent fee agreement. If under the circumstances as discussed herein, prior to award of fees, Attorney and Client have agreed that court awarded attorneys fees will be remitted in part to the Client, then Attorney should inform the court of that fact prior to its award of any attorneys fees. (See Business and Professions Code Section 6068(d); Rule 7-105; LACBA Opinions 226, 261.)

Since this Committee is of the opinion that under the specific limitations stated above the Attorney may remit to Client the amount awarded in excess of the amounts calculated in the fee agreements, both inquiries are discussed together.

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None of the above stated ethical concerns of fee-splitting with lay persons are relevant if the lay person is a client who has employed the Attorney under a prior specified contingency fee agreement and the limited circumstances set forth in this opinion are applicable since the client is not encouraged to practice law, attorney's professional in-

dependence is not compromised, and there is no issue of solicitation of attorney services.

A court may award attorneys fees not limited by the terms of the contingency fee contract. (*Vella v. Hudgins*, 151 Cal.App.3d 515, 198 Cal.Rptr. 725; *Camacho v. Schaefer*, 193 Cal.App.3d 718, 723-725.) Two opinions of this Committee permit an attorney to exact less fees than the statutory amount specified in probate matters. (See LACBA Opinions 68, 102.) The Committee views no ethical impropriety if the Attorney looks only to the original contingency fee agreement for compensation, under the limited circumstances as set forth herein, where attorneys fees are awarded in an amount greater than specified and calculated under the contingency fee agreement.

Opinion No. 448 (December 21, 1987)

ADVERSE AND CONFLICTING INTERESTS. An attorney who has previously prepared estate plans for a husband and wife may not, while his clients are still married, represent the husband with regard to the negotiation and drafting of a Marvin Agreement with another woman without the informed and written consent of the wife.

AUTHORITIES CITED:

ABA Formal Opinion 210;
California Rules of Professional Conduct; Rule 4-101;
Los Angeles County Bar Informal Opinion 1958-5;
Los Angeles County Bar Formal Opinion 403;
California Civil Code §2228;
Probate Code §2101.

The Committee's opinion has been requested concerning the following circumstances. An attorney has acted for a number of years as counsel for a husband and wife with respect to various matters concerning estate planning, including preparation of a living trust and mutual wills.

A year after the preparation of the estate plan, the wife became very ill. Two years later while the wife was still seriously ill, the husband, unbeknownst to his wife, commenced an affair with another woman. The husband and the other woman, who are living together, wish to enter into a Marvin Agreement. The wife is still unaware of her husband's relationship with the other woman.

The following issues, arising from the preceding factual situation, have been presented to us:

1. Can the attorney represent the husband with respect to the negotiation and drafting of the Marvin Agreement without obtaining the informed consent of the wife?

2. Assuming that the attorney has an obligation to inform the wife of the affair and the proposed Marvin Agreement, should separate counsel be obtained for the wife, and in the event that she lacks the necessary capacity to act on her own behalf, should proceedings be commenced to have a conservator appointed?

With regard to the first issue, the Committee is of the opinion that the attorney should not undertake the representation of the husband with regard to the Marvin Agreement without the informed and written consent of the wife. The attorney has previously jointly represented the husband and wife with regard to the preparation of their estate plans.* When the attorney prepared the wills and living trusts, he was given information by the husband and

wife with regard to their estate plans and the method by which they proposed to dispose of their property. We have previously noted in Opinion 403 that information regarding the beneficiaries that a client has named in wills or trusts is confidential.

The inquiry contains insufficient facts for us to determine whether the attorney has an ongoing professional relationship with the wife. The estate plans were prepared three years earlier and the inquiry discloses no representations undertaken by the attorney of husband or wife from the time the estate plan was prepared to the time that the husband requested representation for the Marvin Agreement. The inquiry also does not disclose whether either husband or wife has consulted with or established a professional relationship with another lawyer during this period or whether either the attorney or husband and wife have terminated the professional relationship in the time since the estate plan was prepared.

If it is often difficult for a lawyer who prepared an estate plan to determine whether there is an ongoing relationship with a client, especially when a lengthy period of time has passed since the estate plan was prepared during which the lawyer has performed no further services for the client. The client may seek the services of another attorney without ever disclosing this fact to the lawyer who originally prepared the estate plan. We note that in Formal Opinion 210, the Committee on Ethics and Professional Responsibility of the ABA opined that a lawyer who drafted a will for a client could advise that client of changes in conditions or law that might make a new will desirable. As that Committee stated:

Many events transpire between the date of making the will and the death of the testator. The legal significance of such occurrences are often of serious consequences, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest.

It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will.

Whether the wife could be considered a present or former client of the attorney does not affect our analysis with regard to the first issue in view of the provisions of Rule 4-101 of the California Rules of Professional Conduct. That rule provides:

A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

Rule 4-101 refers to information obtained from both present and former clients. The attorney has previously obtained confidential information from the wife regarding her plan to leave her estate to her husband. The husband's entering into a Marvin Agreement with another woman which potentially could involve community assets would relate to a matter in reference to which the attorney has ob-

SP # 448
Dec 21, 1987

demned. (See Canon 34 of the Canons of Professional Ethics of the American Bar Association.) This agreement, however, does not fall within that condemnation as both the lawyer and the layman are employed and compensated directly by the client. The fact that only the maximum compensation of A and B together was fixed by the client, and that the precise amount to go to each was later to be decided on, does not impair this conclusion.

The Committee believes it would have been preferable to have the resolution of employment so drawn that it would appear on its face, as it now does only by inference, that the sum paid over by the client was turned over to A for both A and B.

In giving this opinion, the Committee assumes that the proposed retainer is not contrary to any provision of statutory law (see Section 274, Penal Law, State of New York) by reason of the lawyer's unqualified assumption of the disbursements, and also assumes that the functions performed by the real estate agent, B, did not constitute unlawful practice of the law.

NUMBER 447 APRIL 6, 1938

Question. X, a lawyer, had a dispute with a club as to the dues X owed. Y, the club's lawyer, telephoned X about the claim, and they finally agreed to settle for a stated sum. A check for that amount was sent to the club and cashed by it. As a part of the settlement, it was agreed that the club should return certain belongings to X, but when X sent for them the club admitted that it had lost them. Some months later, X sued the club to recover their value, whereupon Y telephoned X that unless the suit was dropped he would disregard the settlement and sue for the total originally claimed by the club (less the payment). X refused to drop his suit and Y started suit as threatened.

Was Y's conduct professionally improper?

Answer. Assuming that there was a real dispute as to the amount of the dues, the settlement for less than the amount claimed by the club was a valid settlement and the club's claim for the full dues was not meritorious. It is not proper for a lawyer to institute a suit that he knows is not meritorious in order to deter a party from asserting his legal rights (see Canons 30 and 31 of the Canons of Professional Ethics of the American Bar Association). Assuming that the facts as understood by Y were as above stated, the Committee is of opinion that Y's conduct was professionally improper.

NUMBER 448 APRIL 6, 1938

Question. A firm of New York City attorneys submit the following:

ethics of the American Bar Association do not fall within that employed and compensated maximum compensation and that the precise does not impair this

to have the resolution on its face, as it now the client was turned

the proposed retainer Section 274, Penal qualified assumption of actions performed by practice of the law.

to the dues X owed. and they finally agreed was sent to the club agreed that the club not for them the club sued the club to re-unless the suit was or the total originally drop his suit and Y

to the amount of the paid by the club was a was not meritorious. he knows is not meritorious rights (see Canons of the American Bar Association by Y were as above act was professionally

at the following:

We have brought a representative action on behalf of a policy holder in A insurance company and other policy holders similarly situated, to declare that certain profits earned by policy holders of that class belong to them and should be distributed among them, in which action we also ask for an allowance out of the fund thus created in the event of success on their part.

In examining into the matter, we have come to the conclusion that the same condition obtains with reference to similar policy holders in B, C, and D insurance companies, in which one of our partners is a policy holder of the same class as the policy holder in A insurance company above mentioned.

Is it proper professional conduct for the inquiring attorneys to bring the suggested actions against various insurers in behalf of policy holders other than the partner of the inquirers?

Answer. In the opinion of the Committee, it would be professionally proper for the inquiring attorneys to commence the representative actions suggested in the submission provided they represent their own clients whose retainers were not solicited in the manner condemned by Canon 27 of the Canons of Professional Ethics of the American Bar Association. The Committee does not pass upon the question (of law) relating to seeking an "allowance out of the fund."

NUMBER 449 APRIL 20, 1938

Question. E, an attorney, secured a judgment for a client, and E was fully paid by the client for his services.

About six years afterward, at the former client's request, E turned the papers over to an attorney, the son of the former client, the judgment being then considered worthless.

About the same time E accepted a Government position and turned his law practice over to attorney M.

Thereafter attorney J (a stranger) wrote to E that he (attorney J) would undertake for a 50 percent contingent retainer to collect the judgment, and in the letter offered E a percentage of the retainer. This letter in due course was received properly by attorney M in the general handling of E's practice.

M advised the judgment creditor (the former client of E) of the communication but refused to disclose the identity of the sender (J) for the reason that the judgment creditor wished to engage another attorney (his son) to contact the sender and to leave M out of consideration.

Was it professionally proper for attorney M to refuse to disclose to the judgment creditor the identity of attorney J, the signer of the letter?

Answer. Attorney M, while acting as representative of attorney E, was bound by any obligation then arising that attorney E owed to his former client. E (and consequently M) had the duty to advise the client of the

OP # 449

tained confidential information from the wife. If the wife knew of the relationship between the husband and the other woman and the fact that they were entering into a Marvin Agreement, the wife might want to modify her estate plan or otherwise attempt to change her will and living trust.

If the attorney represents the husband with regard to the Marvin Agreement, he will unquestionably be acting adversely to the wife's interests as the attorney will be facilitating the husband's entering into a relationship which is directly adverse to the marriage. In this regard, we see little difference in principle between the current situation and an attorney representing one spouse in a divorce proceeding when the attorney has previously represented both spouses with regard to the drafting of wills and other related matters. As we noted in our Informal Opinion 1958-5, the latter representation violates Rule 4-101.

The representation of the husband in the negotiation and drafting of the Marvin Agreement is an employment adverse to the wife relating to a matter in reference to which the attorney has obtained confidential information in the course of his employment by the wife. Thus, whether the wife is a present or former client, the attorney has the duty under Rule 4-101 to obtain the informed and written consent of the wife before undertaking the representation of the husband with regard to the Marvin Agreement.

The Committee is of the opinion that the attorney should inform the husband that the attorney will need the consent of the wife in order to undertake the representation. The attorney should also tell the husband that, in order to obtain the wife's informed consent, he will be required to disclose the husband's affair with the other woman. If the husband is unwilling to let the attorney make this disclosure, the attorney should not undertake the representation. Furthermore, if the wife is of such diminished capacity that she cannot herself give an informed consent or if such a disclosure may adversely affect her health, the attorney should not undertake the representation. When a proposed representation can be of little or no value to a person from whom consent is needed and that person is, because of diminished mental capacity, incapable of giving consent, the attorney should not undertake the representation. Any conservator appointed by the court would have the duty to act in the best interests of the conservatee, and it can reasonably be presumed that a conservator would be required to withhold consent. See Probate Code Section 2101 (conservator has same fiduciary duties as trustee); Civil Code Section 2228 (trustee required to act with utmost good faith to further interests of beneficiary).

The second question asks us to assume that the attorney has an obligation to advise the wife of the relationship between the husband and the other woman and the Marvin Agreement. We have not, however, been provided with the factual basis for this assumption. The basis of the assumption may be that the joint representation of the husband and wife by the attorney continued without interruption from the time the estate plan was prepared until the time that the husband asked the attorney to represent him with regard to the Marvin Agreement. We note that Evidence Code Section 963 provides that when two or more clients have retained an attorney upon a matter of common interest, neither of them may claim the attorney-client privilege against the other as to a communication made in the course of that relationship. We have insuffi-

cient facts to determine whether the husband's disclosure to the attorney of his relationship with the other woman was made in the course of the joint representation of the husband and wife or a separate representation that the husband was proposing that the attorney undertake of the husband. If the disclosure was made in the latter instance, these facts may themselves have become the source of a confidential disclosure to the attorney that he is required not to reveal without the husband's consent.

We also have insufficient facts regarding the terms of the living trust to determine what actions, if any, should be undertaken in the event of the wife's incapacity. The living trust may appoint the husband as the trustee in the event of the wife's incapacity, in which event actions undertaken unilaterally by the attorney may violate the terms of the trust which he drafted as well as adversely affecting the husband.

We believe that a conflict between the husband and wife's interests is present which requires the attorney to withdraw from the representation of either. For the attorney to act unilaterally to begin conservatorship proceedings or to make disclosures to the wife may put the attorney in the position of acting adversely to the husband, who appears to be an existing client.

- * The inquiry does not advise us as to the disclosures, if any, the attorney made before undertaking the joint representations of husband and wife nor the nature of any consent that he obtained prior to that representation.

Opinion No. 449 (March, 1988)

LEGAL ADVICE BY TELEPHONE; WORKERS' COMPENSATION "HOT LINE". A telephone "hot line" to give advice for a fee to callers on questions of Workers' Compensation law can ethically be established by an attorney proficient in the field of Workers' Compensation law but the giving of such telephone advice constitutes professional employment which imposes on the attorney all the obligations inherent in a lawyer-client relationship.

AUTHORITIES CITED:

California Business & Professions Code §6068(e)
California Rules of Professional Conduct,
Rules 5-102(A)(B), 6-101, 2-101

The inquiring attorney is a former Workers' Compensation judge now fully retired as such, who has authored several books in the field of Workers' Compensation. From time to time he conducts seminars on Workers' Compensation and unemployment insurance problems for lawyers, personnel managers and insurance company risk managers in various locations throughout California. He frequently receives telephone inquiries on questions of Workers' Compensation and unemployment insurance law from his readers and those who have attended his seminars who ask for advice about their cases or potential cases. Desiring to establish a telephone advice "hot line" to answer such inquiries, he has asked the Committee whether there are any ethical problems in his establishing such a service.

The proposed service would consist of advice given over the telephone in response to a stated set of facts. Charges would be based on the time spent on the

telephone. The inquiring attorney states that he would not be involved in the case to which the alleged facts pertain and it is unlikely that there would be any follow-up after the initial call.

In the opinion of the Committee there is no ethical proscription of such a service, but the giving of telephone advice under the stated circumstances where a fee is charged constitutes professional employment which would impose on the attorney all the obligations inherent in a lawyer-client relationship.

The attorney would therefore be charged with the duty of confidentiality toward each person using his service (Cal. Bus. & Prof. Code, §6068(e)). He would also be under a duty to avoid the representation of adverse and conflicting interests which is prohibited by Rule 5-102(A) and (B), and this might well involve extensive record keeping. To meet the competency requirements of Rule 6-101 the attorney should take care to elicit sufficient information from a telephone client to enable him to render appropriate advice. Any advertisement of the "hot line" and solicitation of subscribers should, of course, conform to the requirements of Rule 2-101.

Opinion No. 450 (May 16, 1988)

ACTION AGAINST PRESENT OR FORMER CLIENT. It is improper for an attorney to bring an action for appointment of conservator for a present or former client, within the scope of the representation of the client, even where the attorney believes that a conservatorship is in the client's best interest.

AUTHORITIES CITED:

California Rules of Professional Conduct 4-101, 5-102
Formal Opinion No. 138

The inquiring attorney was counsel to a husband and wife, now deceased, who left a testamentary trust for the benefit of their four children. Eventually child "A" will take outright, real estate and personal property worth between \$300,000 and \$500,000. This child is unmarried but has one minor child of his own. He has allegedly developed a chemical dependency problem to such an extent that it would be financially imprudent for him to receive this property. The inquiring attorney has served as legal counsel for "A" on a number of matters, including the structuring of "A's" financial affairs. The attorney, as counsel for "A's" siblings, believes that a conservator of the property should be appointed to preserve sufficient capital and income for the future maintenance and well-being of "A." "A" opposes the appointment of a conservator. The inquiring attorney firmly believes that the appointment of a conservator is in the best interests of "A."

The attorney inquires whether he is disqualified from representing a petitioner for the appointment of a conservator of "A's" property, if "A" contests the petition.

The facts of this case are quite similar to those in Formal Opinion No. 138 in which the Committee stated that an attorney may not ethically accept employment for the purpose of instituting proceedings for the appointment of a guardian of the person or estate of his client. Though the opinion was written 47 years ago, it is still valid.

Opinion 138 states that the proceeding for the appointment of a guardian is in the nature of an adversary proceed-

ing, in which the alleged ward could employ counsel and oppose the application. The attorney bringing the application would have been in violation of Canon 6 of the former ABA Canons of Professional Ethics. Old Canon 6 was entitled "Adverse Influences and Conflicting Interests," and its substance has been preserved in California Rules of Professional Conduct 4-101, 5-101 and 5-102.

In the opinion of the Committee the attorney is disqualified from bringing such a petition. It appears that the attorney is presently legal counsel to "A." An attorney is disqualified from bringing a legal action against a present client. Even if the attorney severs his existing attorney-client relationship with "A," it appears from the facts presented to the Committee that the attorney would be disqualified from bringing such an action, because it would be based upon confidential information acquired during the attorney's former representation of "A." An attorney is disqualified from opposing a former client in a matter as to which the attorney has received confidential information. Such conduct would be in violation of Rule 4-101 of the California Rules of Professional Conduct, which states:

A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

Additionally, by representing "A" and the petitioner for the appointment of a conservator, the attorney is in danger of violating Rule 5-102(B), which states that a "member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

Opinion No. 451

PUBLICATION OF LEGAL ARTICLE BY LAWYER RELATED TO A CLIENT'S CASE. An attorney may publish an article in a law journal that is related to the subject matter of a client's case which does not prejudice the client.

AUTHORITIES CITED:

Formal Opinion No. 343;
American Bar Association Informal Opinion No. 1090;
California Rules of Professional Conduct 4-101, 5-101, 5-102, 7-108(b);
Morrison-Knudsen Co. v. CHG International, Inc.,
811 F.2d 1209 (9th Cir. 1987);
North Mississippi Savings & Loan Association v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985),
cert. denied, 474 U.S. 1054 (1986).

A law journal has asked the Committee its opinion on the propriety of the publication of an article by an attorney ("A") on an issue pending before the United States Supreme Court in the following circumstances.

A represents a client ("C") with a claim against a failed savings and loan association, for which the Federal Savings and Loan Insurance Corporation ("FSLIC") has been appointed as conservator. After A obtained a writ of attachment for C in Superior Court, C's case was dismissed by the California Court of Appeal, based on a legislative in-